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Owen S. Solomon

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The Politicization of Amateur Athletics: South Africa and the American Athlete's Legal Dilemma of Participation

I. INTRODUCTION

No matter the level of competition, whether it is the Olympic Games, a local little league championship, or a game of touch football among friends, the enjoyment of athletics is highly valued. Unfortunately, world events often invade the purity of sport, causing international athletics to become politicized.¹ World-class competitions are no longer just individual clashes between athletes on a playing field, but symbols of the broader conflicts among nations.

For many years, both on and off the field, the South African government has been the target of this game of international politics. South Africa's policy of apartheid² has resulted in a barrage of sanctions,³ leaving South Africa economically and politically isolated from

1. Jeffrey M. Marks, *Political Abuse of Olympic Sport*, 14 INT'L L. & POL'Y 155, 157-58 (1981). According to some commentators, sports and politics have always been intertwined. See James A.R. Nafziger & Andrew Strenk, *The Political Uses and Abuses of Sports*, 10 CONN. L. REV. 259, 259-61 (1978).

2. Meaning "apartness" in Afrikaans, apartheid was South Africa's policy governing relations between the white minority and the non-white majority. 1 THE NEW ENCYCLOPEDIA BRITANNICA 477 (15th ed. 1988). This policy sanctioned racial segregation, as well as political and economic discrimination against non-whites. *Id.* Although codified by the Population Registration Act of 1950, which classified people by race, racial segregation was practiced widely for decades. *Id.* Many western nations imposed sanctions on South Africa in order to force the abolition of this policy. *Id.* During the late 1980s, the South African government began to change this system. For example, South Africa eliminated the "pass laws" which restricted internal travel of non-whites. *Id.* Following his election in late 1990, South African President F.W. de Klerk vowed to abolish the apartheid laws by the end of the parliament's 1991 session. Although de Klerk was true to his word by abolishing de jure apartheid in 1991, non-whites still face de facto discrimination in all facets of South African life. Moreover, non-whites do not even have the right to vote. William O. Johnson, "It Is Time, It Is Time": As Apartheid Crumbles, South Africa Emerges After Years as a Sports Pariah, SPORTS ILLUSTRATED, Apr. 2, 1991, at 36. However, in a recent national referendum, white South Africans voted to share power with the non-white majority. See Scott Kraft, *Landslide White Vote Backs End to Apartheid*, L.A. TIMES, Mar. 19, 1992, at A1.

3. In 1969, the United Nations General Assembly recommended a precise framework of economic sanctions directed against South Africa in Resolution 2506. The Resolution directs member states

(a) To desist from collaborating with the Government of South Africa, by taking

the rest of the world. Even South African athletes were targets of a boycott, beginning in May of 1970, when the International Olympic Committee ("IOC") expelled the South African Olympic Committee from membership.⁴ However, in July of 1991, the IOC welcomed South Africa back into the international Olympic community because South Africa repealed its apartheid laws and complied with other conditions set by the IOC.⁵ Although South Africa repealed the

steps to prohibit financial and economic interests under their national jurisdiction from cooperating with the Government of South Africa and companies registered in South Africa;

- (b) To prohibit airline and shipping lines registered in their countries from providing services to and from South Africa and to deny all facilities to air flights and shipping services to and from South Africa;
- (c) To refrain from extending loans, investments and technical assistance to the Government of South Africa and companies registered in South Africa;
- (d) To take appropriate measures to dissuade the main trading partners of South Africa and economic and financial interests from collaborating with the Government of South Africa and companies registered in South Africa.

G.A. Res. 2506, U.N. GAOR Special Political Comm., 24th Sess., Supp. No. 30, at 24, U.N. Doc. A/7630 (1969). In 1977, the United Nations Security Council imposed an arms embargo against South Africa, which is binding on member states. Henry J. Richardson, III, *International Law and the Continuation of Sanctions Against South Africa*, 3 TEMP. INT'L & COMP. L.J. 249, 250 (1989). In addition, the United Nations General Assembly has

approved a declaration which [sets out] guidelines for a democratic South Africa. . . . [These are]

- Negotiations for the end of apartheid,
- resulting in a "united, non-racial and democratic South Africa,"
- a Constitution including a bill of rights to protect whites and other minorities,
- resulting in "universal, equal suffrage under a nonracial voters roll, and by secret ballot, in a united and non-fragmented South Africa."
- Prior to such negotiations, Pretoria must free political prisoners, legalize banned parties, end the state of emergency and withdraw troops from the African townships.

Id. at 250-51. The United States, like many other countries, maintained its own sanctions against South Africa. The United States used economic sanctions as a part of an overall strategic foreign policy which "[was] intended to persuade the South African government to abandon apartheid policies and practices and to implement meaningful political change." Winston P. Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and the Anti-Apartheid Act of 1986*, 4 FLA. J. INT'L L. 85, 112 (1988). The United States used

two forms of economic coercion against South Africa: private sanctions coupled with direct pressure upon corporations to withdraw from, or radically curtail doing business in, South Africa. Pressures have been generated indirectly to have both private and public investors withdraw their investments from corporations doing business in South Africa. Public sanctions are legislative efforts from the state and local levels. Public sanctions are also evidenced in the promulgation of congressional legislation imposing economic sanctions on South Africa.

Id. at 112-13.

4. RICHARD E. LAPCHICK, *THE POLITICS OF RACE AND INTERNATIONAL SPORT: THE CASE OF SOUTH AFRICA* 191-96 (1975).

5. Anita DeFrantz, *Apartheid Just One of the Issues to Be Settled*, USA TODAY, May 28, 1991, at 12C. The conditions included: (1) the South African government must officially and legally abolish apartheid; (2) the Interim National Olympic Committee of South Africa ("IN-

apartheid laws, many freedoms still do not exist for non-whites, such as the right to vote. Thus, some people question whether the IOC was correct in readmitting South Africa.⁶

Amateur athletes continue to suffer from the arbitrary rulings of international and national sports federations. In dealing with the problem, this Comment first describes the history of the politicization of amateur athletics, focusing on the international sanctions imposed against South African athletes because of apartheid. With this historical background set, this Comment then examines the issues that confronted the "South Africa 13,"⁷ thirteen American athletes banned because of their participation in South African athletic competition, including the discriminatory rules and processes used against these athletes by international sports organizations.⁸ After reviewing the remedies available to amateur athletes in the United States and concluding they provide no due process, this Comment proposes that an "Athlete's Bill of Rights" be drafted to provide amateur athletes with an impartial legal forum. Politics must either retreat from the international sports arena, or the United States must fashion a system whereby athletes may obtain an impartial hearing of their claims.

II. THE INFILTRATION OF POLITICS INTO ATHLETICS

Some commentators submit that politics and sports have always been intertwined,⁹ while others question whether this practice should continue. Baron Pierre de Coubertin, who established the modern Olympic movement in 1896,¹⁰ stated,

The aims of the Olympic movement are to promote the development of those fine physical and moral qualities which are the basis of amateur sport and to bring together the athletes of the world in a great quadrennial festival of sports thereby creating international respect and goodwill and thus helping to construct a better and

OCSA") must comply with the IOC Charter in structure (specifically, pursuit of sport on a non-racial basis); (3) the international federations must recognize their respective national sports bodies in South Africa; (4) the national sports must become unified on a non-racial basis; and (5) the Association of National Olympic Committees of Africa must accept the INOSCA. *Id.*

6. *South Africa Turns Down Tokyo Invitation*, L.A. TIMES, July 28, 1991, at C2.

7. Julie Cart, *Now He Has to Live With It*, L.A. TIMES, May 9, 1990, at C1.

8. These organizations included the IOC, the International Amateur Athletic Federation ("IAAF"), the United States Olympic Committee ("USOC"), and The Athletics Congress ("TAC").

9. Nafziger & Strenk, *supra* note 1, at 260.

10. LAPCHICK, *supra* note 4, at xv.

more peaceful world.¹¹

Although emphasizing that the world's athletes should be brought together, Coubertin avoided the term *nations*, because the Olympic Games were intended to be competitions between athletes, not governments.¹² Coubertin hoped that athletes, otherwise separated by political forces, could be brought together,¹³ which ideally would foster an understanding between athletes, leading to friendships, and, in turn, a more peaceful world.¹⁴

It is debatable whether this ideal has been destroyed and if the present generation should attempt to re-establish pure sport.¹⁵ George Orwell stated that international sport "is bound up with hatred, jealousy, boastfulness, disregard for all rules and sadistic pleasure in witnessing violence—in other words, it is war minus shooting."¹⁶ Although cynical, Orwell's statement about international sport may be more realistic than Coubertin's.

Politics has a long and undistinguished history of meddling in athletics. In the ancient Olympic Games, political leaders themselves took the field.¹⁷ If the leaders could not personally participate, they recruited talented athletes in anticipation of the Games, and encouraged them to live in their kingdoms.¹⁸ Thus, at these competitions, the athletes' victories brought acclaim to the city and the ruler they represented, much like today's athletes.¹⁹

11. INTERNATIONAL OLYMPIC COMMITTEE, *OLYMPISM* 1 (Monique Berlioux ed., 1972).

12. "The Olympic Games are competitions between athletes in individual or team events and not between countries." OLYMPIC CHARTER rule 9(1) (1991).

13. LAPCHICK, *supra* note 4, at xv.

14. One of the aims of the Olympic movement enunciated in the Olympic Charter was "to educate young people through sport in spirit of a better understanding between each other and of friendship, thereby helping to build a better and more peaceful world." OLYMPIC CHARTER, *supra* note 12, rule 1(1).

15. For example, many submit that the South African athletic boycott was useful to compel reform of the country's apartheid system. Unfortunately, such a boycott harmed all South Africans, regardless of race or color. South Africans could not compete anywhere in the world except in their own country, and even then non-whites were excluded from elite competitions. In track and field events, all South African athletes are banned from participating anywhere else in the world. IAAF CONST. Other sports, such as golf and tennis, do allow South Africans to compete. See Julie Cart, *Ban From Olympics Turns Into Net Loss*, L.A. TIMES, May 10, 1990, at C1; Julie Cart, *Few Restrictions Against Them*, L.A. TIMES, May 10, 1990, at C10; see also LAPCHICK, *supra* note 4, at 25-26.

16. N.Y. TIMES, Oct. 4, 1959, quoted in LAPCHICK, *supra* note 4, at xv.

17. Frederick C. Klein, *No Tears for the Demise of the Olympic Games*, WALL ST. J., Jan. 25, 1980, at 16.

18. *Id.*

19. *Id.*

Despite Coubertin's ideals, the modern Olympic Games illustrates the politicization of athletics. For example, a number of countries have boycotted the Olympic Games for political reasons.²⁰ In 1980, the United States boycotted the Moscow Olympics to protest the Soviet invasion of Afghanistan. In retaliation, the Soviet Union refused to attend the 1984 Olympics in Los Angeles.²¹ In addition to boycotts, the Games have been used for other political means. For example, Adolf Hitler used the 1936 Olympic Games to spread his Aryan message.²² In addition, some countries view inclusion in the Olympic Games as a sign of international recognition, comparable to membership in the United Nations.²³ Thus, for many years the People's Republic of China refused to compete if Taiwan competed.²⁴ These examples illustrate the erosion of the intended Olympic ideals.

In the past, commentators proposed reforms to eliminate politics from the Olympic Games and all international athletic competition.²⁵

20. In 1956, Spain, Switzerland, and the Netherlands withdrew from the Olympics to protest the Soviet invasion of Hungary. *Id.* In that same year, Egypt, Lebanon, and Iraq boycotted the Olympics to protest the Anglo-French seizure of the Suez Canal. Dennis A. Williams, *Olympic Politics Past*, NEWSWEEK, Jan. 28, 1980, at 24. In 1976, 28 African nations boycotted the Games to protest New Zealand's participation after it sponsored a rugby tour of South Africa the previous year. 1976 U.N. MONTHLY CHRON. 28 (Aug.-Sept.); see also Nafziger & Strenk, *supra* note 1, at 268-71.

21. *Previous Political Clashes*, USA TODAY, Nov. 16, 1990, at C10. Former United States President Jimmy Carter called for a boycott of the 1980 Olympic Games held in Moscow as a protest against the Soviet invasion of Afghanistan. Through this move, the President drew attention to the Soviet invasion. Lord Killanin, former IOC president, considered Carter's boycott effort to be "an 'ill advised, unprepared action' that sought to 'sabotage' the Moscow Olympics." Bradley Graham, *Killanin: Boycott Was Sabotage*, WASH. POST, Sept. 25, 1981, at D1. According to Killanin, "the Games are the 'property of the IOC and not that of the Soviet Union.'" *Id.* In response to the United States' boycott of the Moscow Games, the Soviet Union led a boycott of the 1984 Olympics in Los Angeles. The Soviets had three motives for boycotting the Los Angeles Olympics. First, the boycott was a way to retaliate against the United States for staying away from Moscow in 1980. Second, the boycott avoided the embarrassment of mass defections by Soviet athletes. Finally, the Soviets intended to harm then-President Ronald Reagan politically in a presidential election year. Ranan Lurie, *Stay at Homes*, SPORTS ILLUSTRATED, Mar. 28, 1990, at 160.

22. Nafziger & Strenk, *supra* note 1, at 271-72.

23. See Klein, *supra* note 17.

24. *Id.*

25. Nafziger and Strenk document six ways in which sports have been used to further a nation's foreign policy objectives. The authors address the legality of each of these methods within the framework of the United Nations Charter, its resolutions, and the Olympic Charter. Four categories, dealing with the promotion of international cooperation, were determined to be legal. The remaining two categories, those provoking international conflict, were judged to be either illegal or undetermined. Boycotts and sanctions, the most important use of politics in sport for the purposes of this Comment, fall into the latter category. See generally Nafziger & Strenk, *supra* note 1.

United States Senator and former professional basketball star Bill Bradley suggested five reforms to separate politics and other problems from the Olympic Games.²⁶ Senator Bradley proposed

- (1) having open competition of athletes whether amateur or professional—ability should be the determining factor;
- (2) eliminating team sports as they only simulate war games—have world tournaments to determine the champions;
- (3) giving everyone a participant's medal and gold medals only for those who break records;
- (4) situating the Olympics permanently in Greece—avoid the politics of choosing nations; and
- (5) making the Olympics for the athletes—a festival, not a television spectacle.²⁷

If enacted, these proposals would help return sport to its purest form by eliminating divisive political influences. Until such reforms are enacted, international sanctions will continue to plague international sport.

III. INTERNATIONAL SANCTIONS IN SPORT AGAINST SOUTH AFRICA

South Africa and its athletes have faced sanctions on many levels because of the policy of apartheid. To counter the effects of this policy, the United Nations established an ad hoc committee to address the issue of apartheid.²⁸ Additionally, major international organizations attempted to eliminate contact with South Africa in many sports.²⁹ The sanctions directed the various member nations to boycott South Africa. As to this effort, James Nafziger and Andrew Strenk asserted that "[b]oycotts violate the spirit, if not the letter, of the Olympic Rules, for they are clearly a form of political interference in the activity of a nongovernmental organization."³⁰

Even at its high point, however, not all international sports federations recognized the South African boycott.³¹ Further, even those

26. Bill Bradley, *Five Ways to Reform the Olympics*, N.Y. TIMES, July 21, 1976, at 33.

27. *Id.*

28. The committee was called the Special Committee Against Apartheid. See G.A. Res. 6(F), U.N. GAOR, 31st Sess., Supp. No. 39, at 12, U.N. Doc. A/31/39 (1976).

29. See *supra* note 15.

30. Nafziger & Strenk, *supra* note 1, at 283.

31. For example, the sports federations governing golf, boxing, auto racing, tennis, and rugby did not recognize the boycott. Athletes in these sports were free to participate in South Africa without fear of reprisals. Additionally, South Africans were free to compete in these sports in other countries. Individuals and local sporting authorities have protested the lack of

federations that did recognize the boycott had differing levels of enforcement. For example, some federations did not allow participation with any South African in any competition anywhere in the world.³² Others simply excluded direct competition in South Africa.³³

Three examples illustrate this inconsistent treatment of athletes. First, while some athletes may participate in South Africa without the threat of sanctions, others cannot.³⁴ Second, in some sports, the non-white South African population is twice hit by apartheid.³⁵ Presuma-

a boycott. UNITED NATIONS CENTRE AGAINST APARTHEID, SPECIAL COMMITTEE AGAINST APARTHEID; REGISTER OF SPORTS CONTACTS WITH SOUTH AFRICA, JAN. 1, 1989 - DEC. 31, 1989, AND CONSOLIDATED LIST OF SPORTSMEN AND SPORTSWOMEN WHO PARTICIPATED IN SPORTS EVENTS IN SOUTH AFRICA, SEPT. 1, 1980 - DEC. 1989, at 2-8. Notably, Nigel Benn, a black middleweight and former Commonwealth boxing champion, turned down a two million pound purse to fight in South Africa. He stated, "I'd rather fight anyone in the world for five pounds rather than earn all the gold in South Africa by boxing there." *Id.* Additionally, due to a protest by the Australian Anti-Apartheid Movement, the South African flag was not flown at the Australian Tennis Championships, one of the four grand slam tennis tournaments. These represent only a few of the many responses to the perceived inaction against apartheid by these particular sports organizations. *Id.*

32. See *infra* part III.C.

33. UNITED NATIONS CENTRE AGAINST APARTHEID NEWS DIGEST, U.N. INTERNATIONAL OLYMPIC COMMITTEE MOVES TO KEEP SOUTH AFRICA OUT OF COMPETITION (July-Aug. 1989) [hereinafter CENTRE AGAINST APARTHEID NEWS DIGEST].

34. See *supra* notes 15, 31.

35. Sanctions applied to the entire South African nation, and were not limited to white South Africans who attempted to participate in international competitions. One such affected person was Mark Plaatjes, a non-white athlete from South Africa. Julie Cart, *Freedom to Train: Marathoner Leaves His South African Home to Try to Forge a New Beginning in America*, L.A. TIMES, Mar. 1, 1989, at C1. Plaatjes, a marathon runner, competed in South Africa with great success. *Id.* Because he was of a mixed race, he was allowed to compete against whites in South Africa. *Id.* Plaatjes, however, longed for more. He stated,

Being an athlete in South Africa is very frustrating. You compete against the same people all the time. You compare times with a person [not in South Africa] but it is not the same as when you run against that person. You can't call yourself the best or know how good you are when you can't compete against the rest of the world.

Id. Plaatjes feels that there are superior black athletes in South Africa who do not have the opportunity to compete internationally because boycotts confine them to domestic competitions. Bert Rosenthal, Associated Press, Nov. 4, 1989, available in LEXIS, Nexis Library, AP File. Plaatjes bypassed these boycotts by renouncing his South African citizenship and requesting political asylum in the United States. *Id.* In 1989, he became a registered member of TAC, allowing him to compete for the United States in competitions other than the Olympic Games. *Id.* Plaatjes hopes to receive his United States citizenship in 1993. *Id.*

In regard to the other athletes in South Africa who are not so fortunate, Julie Cart remarked,

In the Republic of South Africa, where sport often appears to lack a human face, this strange society is at once a birthplace of achingly talented athletes and the burial ground for their dreams.

There is a road there and it is a true path for only those whose skin color gains

bly, these boycotts and sanctions exist for the purpose of gaining non-white majority rule. Thus, the same people the boycott is intended to protect are barred from competing in many sports once they leave the country.³⁶ Third, not all international sports federations strictly adhere to the rules and regulations.³⁷

Over the past twenty-five years, the IOC, United Nations, and the IAAF, have all employed sanctions against South Africa in one form or another.³⁸

A. *The International Olympic Committee's Actions Toward South Africa*

1. Pre-1990 History

The Olympic Charter ("Charter") states that "[n]o discrimination in [the Olympic Games] is allowed against any country or person on grounds of race, religion or politics."³⁹ Thus, banning teams and athletes from competing in the Games appears to violate both the letter and the spirit of the Charter. By not allowing South African teams to compete because of internal policy, the IOC discriminates against South African athletes based on their country's political structure. Assuming athletics are in a vacuum and separate from politics, a formalistic interpretation of the Charter suggests that the South African government is no more guilty than the IOC of violating the Charter.⁴⁰ The IOC's actions toward South Africa must be questioned, because the act of boycotting a nation discriminates against that nation on the basis of politics.

In 1963, the IOC scheduled a meeting in Baden-Baden, Austria with the South African Olympic Committee ("SAOC") and other national Olympic committees to discuss the racial integration of the

them entrance. For the remaining—for the many—there is only a chance to run alongside the path, never on it.

Cart, *supra*, at C1.

36. See generally *supra* note 35.

37. For example, TAC applied its rules in a novel fashion when it dealt with Zola Budd and the "South Africa 13." Julie Cart, *TAC Bans Coach & 3 Athletes*, L.A. TIMES, Nov. 19, 1988, at C1.

38. See *infra* parts III.A and III.C.

39. OLYMPIC CHARTER rule 3 (1980). As amended, the rule states that "[a]ny form of discrimination to a country or a person on grounds of race, religion, politics, sex or otherwise is incompatible with belonging to the Olympic Movement." OLYMPIC CHARTER, *supra* note 12, rule 3(2).

40. See *id.*; see also *supra* part II.

South African Olympic team in the 1964 Tokyo Games.⁴¹ The IOC had two concerns:⁴² (1) whether the South African team would be racially integrated,⁴³ and (2) what guarantees the SAOC could make to ensure that an integrated team would be sent.⁴⁴ The SAOC stated that apartheid was a domestic concern and that it would independently take proper steps to ensure integration.⁴⁵

The IOC did not ban South Africa at this time, but took an important step by passing the Baden-Baden Resolution ("Resolution").⁴⁶ The Resolution strongly criticized South Africa's domestic policy and urged policy changes in line with Olympic ideals.⁴⁷ Some international sports officials felt that the Resolution went too far. One American sports official described the decision as "short-sighted and marking the breakup of the Olympic Games."⁴⁸ The South African government stated that its policies would not change in response to the IOC Resolution.⁴⁹

At its 1964 Innsbruck, Austria meeting, the IOC barred South Africa from the 1964 Games for the latter's refusal to abide by the Resolution.⁵⁰ Although South Africa had invited all races to compete in the South African Olympic trials, the IOC remained unsatisfied.⁵¹ The IOC ruled that until the official South African policy changed, or until the SAOC denounced its government's apartheid policy, South

41. LAPCHICK, *supra* note 4, at 51.

42. *Id.* at 52.

43. *Id.*

44. *Id.*

45. *Id.* The SAOC professed that any "non-white" athlete worthy of attending would do so. *Id.*

46. *Minutes of the Sixtieth Session of the IOC, Baden-Baden, Oct. 1963, cited in REPORT OF THE IOC COMMISSION ON SOUTH AFRICA* at 21.

47. *Id.* According to the Resolution, the SAOC

must make a firm declaration of its acceptance of the spirit of the Olympic Code and in particular of Principle 1 and Rule 24 read together, and must get from its Government by December 31st 1963 a change in policy regarding racial discrimination in sports and competitions in its country, failing which the South African National Olympic Committee will be debarred from entering its teams in the Olympic Games.

Id.

48. LAPCHICK, *supra* note 4, at 52.

49. South African Minister of Interior, and future President of South Africa, F.W. de Klerk stated,

South African custom is that within the boundaries of the Republic, whites and non-whites exercise their sports separately and this custom must be adhered to, that is; that within our boundaries, whites and non-whites must not compete with each other, either in individual items or in teams or as members of teams.

THE TIMES (London), Feb. 5, 1963, *quoted in* LAPCHICK, *supra* note 4, at 53.

50. LAPCHICK, *supra* note 4, at 60-61.

51. *Id.* at 61.

Africans could not compete in the Games.⁵² Thus, South Africa did not compete, and the Baden-Baden Resolution became a hallmark as other sports federations reviewed their positions on South Africa.⁵³

Although very little change took place within South Africa, there was an attempt to profess a better outward representation as the 1968 Games approached.⁵⁴ The South Africans agreed to have one racially-mixed team represent their country.⁵⁵ The IOC sent a commission to investigate the South African situation first hand.⁵⁶ Based on the commission's report, which cited improvements towards fulfilling Fundamental I of the Olympic Charter, the IOC allowed South Africa to enter the 1968 Mexico City Games.⁵⁷ Considerable outrage erupted over this decision,⁵⁸ with many nations believing that the decision supported apartheid.⁵⁹ The international uproar led African and other nations to threaten Olympic boycotts.⁶⁰ The IOC defended its decision, but later buckled under the pressure of the outcry.⁶¹ Subsequently, the IOC revoked South Africa's invitation in April of 1968.⁶²

It was believed that South Africa would be expelled from the IOC at its Warsaw meeting the following year.⁶³ However, the vote on South Africa's expulsion was delayed until 1970.⁶⁴ In 1970, the assembly of National Olympic Committees ("NOC") met in Dubrovnik, Yugoslavia and voted to expel South Africa.⁶⁵ Although not

52. *Id.*

53. *Id.* at 65.

54. *Id.* at 93-94.

55. *Id.* South African National Olympic Committee ("SANOC") official Braun proposed five new concessions:

1. One team would represent all South Africans.
2. The team would travel together.
3. The team would live together, wear the same uniform, and march together as an integrated team under one flag.
4. Whites and non-whites could compete against each other at the games.
5. An equal number of whites and non-whites, under Braun's chairmanship, would select the participants.

SUNDAY TIMES (Johannesburg), Sept. 8, 1963, reprinted in LAPCHICK, *supra* note 4, at 93.

56. LAPCHICK, *supra* note 4, at 97.

57. *Id.* at 107-11.

58. *Id.* at 112-19.

59. *Id.*

60. *Id.*

61. *Id.* at 119.

62. *Id.*

63. *Id.* at 143.

64. *Id.*

65. *Id.* at 143-44.

binding on the IOC, the NOC's vote signified that apartheid would no longer be tolerated.⁶⁶ At the 1970 IOC Amsterdam meeting, the African NOCs presented a list of reasons why South Africa should be expelled.⁶⁷ The South African National Olympic Committee representative inflamed the delegates with his defiance.⁶⁸ Largely due to this representative's remarks, South Africa was not only barred from the 1972 Olympic Games, but also expelled from the entire Olympic movement.⁶⁹

Although expelled from the Olympic movement, South Africa remained a source of controversy. In 1976, a New Zealand rugby team's South African tour caused twenty-eight African nations to boycott the Montreal Olympics.⁷⁰ As South Africa's policies began to change in the 1980s, however, some called for a change in the IOC's position.⁷¹ Initially, the IOC did not respond to the requests. In fact, in 1989, the IOC strengthened its sanctions against South Africa.⁷² Specifically, the IOC barred any athlete who competed in South Africa from competing in the Olympic Games.⁷³ The United States Olympic Committee's ("USOC") twenty-one member administrative committee and executive board ratified the IOC's decision.⁷⁴ When

66. *Id.*

67. *Id.* at 191-92. Essentially, the charges against the SANOC were that its policy was tied to its government in violation of Rule 25, it did not guarantee membership to non-whites, and it practiced racial discrimination of all types. *Id.*

68. Braun stated:

Could any purpose be achieved other than personal aggrandizement, chauvenistic [sic] aspirations and satisfactions derived from hatred? The relentless campaign against SANOC is purported to be inspired by the condemnations of racial intolerance in South Africa. Do the protagonists of this campaign against SANOC themselves display the degree of compassion and tolerance that they demand of South Africa? . . . The peace and friendship that the IOC has been able to create for the South African non-white and white athletes should not be endangered by exorbitant demands and threats of expulsion.

Id. at 194.

69. *Id.* at 192-96.

70. Marks, *supra* note 1, at 160. The African nations felt that allowing New Zealand to participate in the Olympic Games was hypocritical. The rugby tour in South Africa by New Zealand was interpreted as condoning the apartheid system. By boycotting, the nations hoped to exhibit their disdain both for South African apartheid and for those who chose to participate in athletic competitions in that country. *Id.*

71. OLYMPIC REV., Mar. 1990, at 122-23.

72. CENTRE AGAINST APARTHEID NEWS DIGEST, *supra* note 33.

73. *Id.*

74. *USOC Seeking Stronger Sanctions in Connection with South Africa*, L.A. TIMES, Sept. 19, 1989, at C5; Randy Harvey, *USOC Meeting: San Diego Facility Gets Funding at Last*, L.A. TIMES, Oct. 23, 1989, at C3.

asked about readmitting South Africa to the Olympic movement in 1990, IOC President Juan Antonio Samaranch said:

From the information we have, apartheid still exists in South Africa. . . . We therefore need to be cautious in order to avoid any error in judgment. The signs we observed are a step in the right direction, and [the IOC] shall be following [the South African government's] attitude during the coming months.⁷⁵

2. Post-1990 Developments

In January 1991, South African President F.W. de Klerk made an announcement that sent shock waves throughout the world and had special ramifications for the world of international athletics. President de Klerk announced that by the end of South Africa's 1991 parliamentary session, the nation's official policy of racial segregation would be eliminated.⁷⁶ Following this announcement, the IOC initially stood by its position that the organization would be looking for irreversible change.⁷⁷ IOC Vice-President Richard Pound stated, "I don't think the door is open at this point [to the return of South Africa to the world's athletic stage]."⁷⁸ In response to President de Klerk's incredible announcement, however, the IOC established a program to investigate and measure progress in South Africa.⁷⁹ The goal of this program was to readmit South Africa to the Olympic movement if apartheid was, in fact, repealed.⁸⁰

a. Foundation for South African Readmittance

The process of South Africa's readmittance to the Olympic community began with a March 1991 visit to South Africa by the IOC Apartheid Commission, the first visit of its type since 1967.⁸¹ The visit enabled the IOC to measure the progress of the removal of racial barriers in sports as well as assess the unity in South Africa's national governing bodies.⁸² Upon its arrival in South Africa, the IOC delegation met with a range of officials, including President de Klerk, Afri-

75. OLYMPIC REV., Mar. 1990, at 123.

76. Julie Cart, *IOC Waiting to See Progress in South Africa*, L.A. TIMES, Feb. 5, 1991, at C3.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

can National Congress ("ANC") Deputy President Nelson Mandela, and Zulu Chief Mangosuthu Gatsha Buthelezi.⁸³ After the meetings and a tour of the South African sports facilities, the delegation took the first step towards readmitting South Africa to the Olympic movement⁸⁴ by conditionally recognizing the country's new post-apartheid Olympic Committee.⁸⁵

In addition, the IOC group established five conditions for lifting the moratorium on South African international competition.⁸⁶ The five conditions were as follows: (1) The South African government must officially abolish apartheid; (2) the Interim National Olympic Committee of South Africa ("INOCOSA") must comply with the IOC Charter; (3) the national sports organizations in South Africa must be recognized by their international federations; (4) the national sports organizations must unify on a non-racial basis; and (5) the Association of National Olympic Committees of Africa must accept the INOCOSA.⁸⁷ The leader of the delegation, Judge Keba M'Baye from Senegal, declined to comment on what guidelines the IOC would use to determine whether apartheid was abolished.⁸⁸ At the time, black groups in South Africa, including the ANC, embraced a broader definition of apartheid than did the ruling government.⁸⁹ Thus, these groups maintained that international pressure should continue until the government took even greater steps toward redressing the economic imbalances created by four decades of apartheid, and granted blacks the right to vote.⁹⁰

The next step in the process for South African readmittance was approval by the IOC's Executive Board.⁹¹ When the Executive Board met in April 1991, it conditionally recognized the country's interim, desegregated Olympic Committee.⁹² Judge Keba M'Baye again expressed optimism that South Africa would meet the five conditions, and thus receive full recognition as the IOC's 168th member by July.⁹³ Recognition would enable South Africa to send a team to the

83. Scott Kraft, *Five Conditions Set for South Africa*, L.A. TIMES, Mar. 28, 1991, at C1.

84. *Id.*

85. *Id.*

86. *Id.*

87. DeFrantz, *supra* note 5, at 12C.

88. See Kraft, *supra* note 83, at C1.

89. *Id.*

90. *Id.*

91. Cart, *supra* note 76, at C3.

92. Randy Harvey, *South African Committee Gets OK*, L.A. TIMES, Apr. 16, 1991, at C2.

93. *Id.*

1992 Summer Olympics in Barcelona.⁹⁴ Since the IOC's visit in March 1991, South Africa had made progress. Primarily, five factions representing blacks and whites consolidated to form the IN-OCSA. This was an important first step in satisfying the IOC's conditions.⁹⁵ However, South Africa would have to wait further before being fully recognized by the IOC. The IOC sent another delegation to South Africa in May 1991 to assess the progress.⁹⁶

Following that visit, the full IOC met in Birmingham, England.⁹⁷ During this session, the IOC members cleared the way for South African reinstatement by granting the Executive Board the authority to readmit South Africa once the conditions were met.⁹⁸ By that time, the South African government had abolished two of the three major apartheid laws, and the third, the Population Registration Act, would soon go before South Africa's parliament.⁹⁹ According to Judge Keba M'Baye, once the parliament abrogated that law, "nothing [would] stop the Executive Board" from inviting South Africa to the Barcelona Olympics in the summer of 1992.¹⁰⁰

Finally, on July 9, 1991, the Executive Board of the IOC readmitted South Africa to the Olympic movement.¹⁰¹ The Board determined that South Africa, and its sports organizations, had sufficiently satisfied the conditions set out earlier in the year.¹⁰² This decision cleared the way for South Africa's participation in the 1992 Olympic Games in Albertville, France and in Barcelona, Spain.

b. Problems in Readmitting South Africa

Although a clear path had been opened, the months preceding and following readmittance were not without problems. First, critics both inside and outside of South Africa were unsure if readmittance was the proper course for South Africa at this time.¹⁰³ The concern was that readmission would give the outward appearance that the "official" abolition of apartheid meant that discrimination no longer ex-

94. *Id.*

95. *Id.*

96. *Id.* at C10.

97. *IOC Paves Way to Readmit South Africa*, L.A. TIMES, June 14, 1991, at C5.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Julie Cart, *South Africans to Enter Olympics*, L.A. TIMES, Nov. 7, 1991, at C1.

102. *See* William C. Rhoden, *Sports of the Times; A Return to Fun and Games*, N.Y. TIMES, July 11, 1991, at B7.

103. Johnson, *supra* note 2, at 36.

isted in South Africa.¹⁰⁴

For example, although the ANC publicly supported the IOC's conditional recognition of the INOCSA, it did not support the IOC's rush to recognition.¹⁰⁵ The ANC and others openly commented that the real propulsion behind the push for recognition was not the recent developments in South Africa,¹⁰⁶ but, rather, IOC President Juan Antonio Samaranch's desire to have the first "all-nation" Olympics in decades held in his hometown of Barcelona.¹⁰⁷ The ANC's chief sports liaison remarked that "[i]t's all well for the people at the top to say South Africa is going to the Olympics, but integration of sports must begin at the bottom, and this is not something that can be conveniently hurried."¹⁰⁸

The position taken by the South African Council on Sport in the months preceding readmission echoed the ANC's view.¹⁰⁹ This group's opposition to readmittance was consistent with its opposition to apartheid in South African sports during the previous eighteen years.¹¹⁰ The group's president, Yusuf Ebrahim, summarized its position:

When South Africa was suspended from the Olympic movement, the decision taken by the Olympic Committee was based on the fact that apartheid denied people their political rights in this country What the I.O.C. is doing now in many ways goes back on that decision because *apartheid has not been removed from South African society*, and the promise to repeal certain laws will not in itself remedy the situation. The only way the situation can be remedied is to allow people to have the political rights to which they are entitled, to be recognized as citizens in the country of their birth.¹¹¹

Senior officials of the South African Amateur Athletic Board reiterated Ebrahim's position by stating that it would be wrong for South Africa to participate in the 1992 Olympics because of the incorrect

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. William C. Rhoden, *South Africa's Re-entry Opposed*, N.Y. TIMES, Apr. 25, 1991, at B20.

110. *Id.*

111. *Id.* (emphasis added).

political climate.¹¹² One official stated, "We are excited about getting back into the Olympic movement, but the time is not right now."¹¹³

In addition to the outcry within South Africa, many political and athletic leaders outside of South Africa were also uncertain about the propriety of the IOC's recent moves.¹¹⁴ Anita DeFrantz, a United States delegate to the IOC, stated,

Obviously, the end to apartheid is not the end to racism in South Africa. As an African American born in this half of the 20th century, I have experienced the effects of both de jure (by law) segregation and de facto (by practice) segregation. Just as abolishing Jim Crow laws did not end racism in the U.S., I don't expect the abolition of apartheid to end racism in South Africa.¹¹⁵

Some believed that readmittance to the Olympic movement would help move South Africa in the proper direction, but most remained unconvinced.¹¹⁶ Ann Griffin of the anti-apartheid group, TransAfrica, declared, "I can't see how the normalization of relations with South Africa through sports would encourage the South African administration to move faster. They'll become complacent. They'll presume they bought time."¹¹⁷ Interested onlookers are wary of complacency and fear that the possibility of change is de minimis. A distinguished sports sociologist, Harry Edwards, commented,

It shouldn't just happen on the basis of some promises De Klerk put down on paper. He could be out of office in 1992. An ending to apartheid is not just changing some rules in a book. Actual structural changes in team composition, the organization of sport, access to facilities and common training grounds must occur. We should wait for demonstrable evidence.¹¹⁸

In contrast, the IOC felt that the change it witnessed was enough.¹¹⁹ South Africa's continued banishment would only harm South Africans of all color, and the time had come for readmittance.¹²⁰ Dick Pound, an IOC vice-president, noted that "[w]e can't put South Africa off until everything there is fair. If we only allowed

112. *Timberwolves Close to Naming Rodgers as Their New Coach*, L.A. TIMES, June 19, 1991, at C2.

113. *Id.*

114. Johnson, *supra* note 2.

115. DeFrantz, *supra* note 5.

116. Tony Kornheiser, *Wielding a Mighty Carrot*, WASH. POST, July 11, 1991, at B1.

117. *Id.*

118. Johnson, *supra* note 2.

119. *Id.*

120. *Id.*

in countries where everything is fair, we would have a very small Olympic Games.”¹²¹ Thus, as the debate continues, South Africa will participate in the 1992 Olympics.

The other area of concern surrounding readmittance dealt with the composition of the South African sports organizations. As a condition for readmittance, South Africa established an interim, desegregated Olympic Committee.¹²² Despite South Africa’s compliance, disagreement among the IOC members regarding readmittance of South Africa continued for months. There were several points of disagreement.

First, prior to the readmittance decision, senior officials of the South African Amateur Athletics Board (“SAAAB”) opposed South African participation in the 1992 Olympics.¹²³ Cedric Van Wyk, a senior administrator of the group stated that “[w]e are categorically against South Africa getting back into international sports in the next five years because 90% of the population has been deprived of participation.”¹²⁴ Although Van Wyk’s position may be extreme, it demonstrates the internal problems South Africa faced. The first test for South African unity came as the World Championships of Track and Field approached in August 1991.¹²⁵

Second, although invited to the competition, the South African Amateur Athletic Association (“SAAAA”), a composite of three racially integrated groups, voted against sending a team.¹²⁶ The vote exemplified the internal disapproval of South Africa’s swift admission into the Olympic movement by two groups—the South African Amateur Athletics Congress (“SAAAC”) and the SAAAB.¹²⁷ These two groups believed that apartheid still flourished in South African teams, facilities and coaching.¹²⁸ Furthermore, the groups believed that participation should not be permitted until de facto discrimination was eliminated.¹²⁹ Following this vote, a group of twenty-eight South African athletes applied independently to the IAAF for a place in the championships.¹³⁰ The IAAF rejected these applications, stating that

121. *Id.*

122. DeFrantz, *supra* note 5.

123. *Timberwolves Close to Naming Rodgers as Their New Coach*, *supra* note 112, at C2.

124. *Id.*

125. Elliott Almond, *Athletes Can’t Go It Alone*, L.A. TIMES, Aug. 7, 1991, at C1.

126. *South Africa Turns Down Tokyo Invitation*, *supra* note 6, at C2.

127. *Id.*

128. *Id.*

129. *Id.*

130. Almond, *supra* note 125.

it could not accept individual applications.¹³¹ The athletes believed they were being held as political prisoners in their own country,¹³² and resented being used as pawns in political games.¹³³

The incidents surrounding the World Track and Field Championships made South Africa's participation in the 1992 Summer Olympics doubtful.¹³⁴ However, in an effort to rectify problems, a movement to unify the goals and organizations within South Africa began.¹³⁵ The ongoing disunity was overlooked when the International Gymnastics Federation ("IGF") chose athletics over politics by permitting South Africa to compete in the 1991 World Gymnastics Championships.¹³⁶ IGF President Yuri Titov was satisfied that the South African Amateur Gymnastics Union ("SAAGU") pursued a nonracial course, and was successful in integrating its development programs.¹³⁷

The IGF's decision had two important effects. First, the decision forced Commonwealth nations to compete under protest, because the Gleneagles Agreement, a policy which forbids direct contact with South Africa by British Commonwealth nations, was still in effect.¹³⁸ Participation by both South Africa and Commonwealth nations in the same events would violate this policy.¹³⁹ This problem highlights the need for international change if future boycotts are to be avoided. Second, the IGF chose the SAAGU over the objections of the National Olympic Committee of South Africa ("NOCOSA").¹⁴⁰ Previously, NOCOSA informed the SAAGU that it could not compete in those championships.¹⁴¹ Thus, turmoil among rival sports organizations was continuing in South Africa.

As the 1992 Olympics drew near, South African participation seemed improbable. After months of negotiations, however, NOCOSA announced in November 1991, that it would send a team to Barce-

131. *Id.*

132. *Id.*

133. *Id.*

134. *South Africa Turns Down Tokyo Invitation*, *supra* note 6.

135. *Welch Gets Injunction, Can Coach This Season*, L.A. TIMES, Aug. 20, 1991, at C3.

136. *MaryAnn Hudson, Gymnastics Opens Door to South Africa*, L.A. TIMES, Sept. 6, 1991, at C1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

lona.¹⁴² Anti-apartheid groups initially opposed to participation supported the announcement.¹⁴³ Sam Ramsamy, Chairman of the NOCSA, indicated that South Africa would break with tradition, and not march under the nation's flag,¹⁴⁴ and instead utilize an "interim" NOCSA flag.¹⁴⁵ Additionally, Ramsamy asked the IOC for permission to use the Olympic Hymn in medal ceremonies.¹⁴⁶ Such changes were necessary because many non-whites interpret South Africa's current flag and hymn as embodiments of white rule.¹⁴⁷

Just when it appeared that all was settled, in December 1991, the SAAAU walked out of unity talks aimed at ensuring South African participation in track and field events at the Barcelona Games.¹⁴⁸ Subsequently, a leading anti-apartheid sports official was appointed to negotiate SAAAU's return to the bargaining table.¹⁴⁹ However, SAAAU members continued to claim that the other two groups involved, the SAAAB and SAAAC, were trying to reintroduce racial barriers to prevent South Africa's Olympic entry.¹⁵⁰ Thus, the future of participation for South Africa remained unsettled, although Olympic participation at some level appeared guaranteed.

The preceding discussion highlights the tumultuous history of one nation's struggle to obtain readmission to the Olympic Games. It remains unclear what the deciding readmission factors were, but it is apparent that politics influenced the decision. The problem that many commentators see with such influences concerns the value judgments sports leaders make when arriving at decisions. For example, who is to say whether oppression in communist countries is better than the discrimination in South Africa? Ruth Wysocki, an American middle-distance runner who was banned from international athletic competition for participating in South Africa, commented at her 1990 hearing before TAC:

We have been accused of supporting apartheid by going to South Africa . . . I feel that this argument is shallow because we are able to compete in the USSR, China, East Germany, Hungary, Poland and elsewhere without being accused of supporting Communism. I

142. Cart, *supra* note 101, at C1.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Sports Politics: Push for SA Unity*, THE INDEPENDENT, Dec. 20, 1991, at 31.

149. *Id.*

150. *Id.*

do not support apartheid, nor do I see how any person could support such policies.¹⁵¹

A TAC official countered "by pointing out that those countries Wysocki mentioned at least 'practiced equal oppression' against everyone in society and did not single out groups."¹⁵² The rationale supporting a South African ban, that oppression is acceptable when it oppresses all people, demonstrates the absurdity of the TAC rulings and hearings. It is time to question the intelligence and foresight of the world's sports leaders, as shown by the treatment of South African athletes.

B. *The United Nations' Actions Toward South Africa*

The United Nations initially expressed its anti-apartheid position in the early 1970s. United Nations Resolution 2775(D)¹⁵³ noted that the boycott of South African sports teams effectively demonstrated the international condemnation of apartheid.¹⁵⁴ The United Nations did not oppose the sporting events themselves, but rather believed the boycotts necessary to protect athletes and others from human rights violations.¹⁵⁵

151. Julie Cart, *TAC Suspends 12 Athletes, Coaches*, L.A. TIMES, Jan. 19, 1989, at C6.

152. *Id.*

153. G.A. Res. 2775(D), U.N. GAOR, 26th Sess., Supp. No. 29, at 42, U.N. Doc. A/8429 (1971).

154. *Id.* Resolution 2775(D) provides:

Bearing in mind that 1971 was designated as the International Year for Action to Combat Racism and Racial Discrimination, to be observed in the name of the ever-growing struggle against racial discrimination in all its forms and manifestations and in the name of international solidarity with those struggling against racism, the General Assembly

1. *Declares* its unqualified support of the Olympic principle that no discrimination be allowed on the grounds of race, religion or political affiliation . . .
3. *Solemnly calls upon* all national and international sports organizations to uphold the Olympic principle of non-discrimination and to discourage and deny support to sporting events organized in violation of this principle;
4. *Calls upon* individual sportsmen to refuse to participate in any sports activity in a country in which there is an official policy of racial discrimination or apartheid in the field of sports . . .
6. *Requests* national and international sports organizations and the public to deny any form of recognition to any sports activity from which persons are debarred or in which they are subjected to any discrimination on the basis of race, religion or political affiliation . . .
7. *Condemns* the actions of the Government of South Africa in enforcing racial discrimination and segregation in sports . . .
9. *Commends* those international and national sports organizations that have supported the international campaign against *apartheid* in sports[.]

Id.

155. Nafziger & Strenk, *supra* note 1, at 283-84.

In 1975, the United Nations reaffirmed its earlier position in General Assembly Resolution 3411(E).¹⁵⁶ This Resolution, passed in connection with New Zealand's controversial 1976 rugby tour of South Africa,¹⁵⁷ went further than simply urging all nations to boycott competition with any of New Zealand's teams.¹⁵⁸ The Resolution commended all governments, sports bodies, and other organizations that took action, in pursuance of the Olympic principle and the relevant resolutions of the United Nations, for the boycott of racially selected South African sports bodies or teams. Further, it called upon all governments, sports bodies, and other organizations to refrain from all contacts with all sports bodies established on the basis of apartheid and to exert influence to secure the full implementation of the Olympic principle.¹⁵⁹

However, like any United Nations resolution, these directives are only advisory and non-binding.¹⁶⁰ Thus, in addition to resolutions, the United Nations established committees to combat apartheid in sports.¹⁶¹ Unlike the General Assembly or Security Council, these committees concentrate exclusively on the issue of apartheid.¹⁶² The committees monitor the situation in South Africa, publish materials, and make recommendations for action to the larger bodies.¹⁶³

One of these committees is the United Nations General Assembly, which proposed the International Declaration Against *Apartheid* in Sports.¹⁶⁴ The United Nations Special Committee Against Apartheid ("Special Committee") and the Centre Against Apartheid ("Centre") are two other such groups. The Special Committee continues to promote the South African boycotts,¹⁶⁵ and assists the Cen-

156. G.A. Res. 3411(E), U.N. GAOR, 30th Sess., Supp. No. 34, at 37, U.N. Doc. A/10034 (1975).

157. See *supra* notes 20, 70 and accompanying text.

158. G.A. Res. 3411(E), *supra* note 156, at 39.

159. *Id.*

160. Nafziger & Strenk, *supra* note 1, at 284.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 284-85.

165. *Id.* at 285. Based on the Ad Hoc Committee on the Drafting of an International Convention Against Apartheid in Sports' recommendation, the United Nations General Assembly adopted the International Declaration Against *Apartheid* in Sports on December 14, 1977. G.A. Res. 32/105(M), U.N. GAOR, 32d Sess., Supp. No. 45, at 38, U.N. Doc. A/32/45 (1977). This document is made up of a statement of purpose followed by 18 articles that set out directives for nations, international and federal organizations, and athletes to follow in combatting apartheid in athletics, both in and outside of South Africa. Some of the Declaration's important aspects are covered by the following excerpts:

The General Assembly,

....
Considering the Universal Declaration of Human Rights, which states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration without discrimination of any kind such as race, colour or national origin

....
Recalling further that the International Convention on the Suppression and Punishment of the Crime of *Apartheid* declares that *apartheid* is a crime violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security

....
Reaffirming the legitimacy of the struggle of the people of South Africa for total elimination of *apartheid* and racial discrimination

....
Condemning the enforcement, by the racist regime of South Africa, of racial discrimination and segregation in sports

....
Convinced that an effective campaign for the total boycott of South African sports teams can be an important measure in demonstrating the abhorrence of *apartheid* by Governments and peoples

....
Condemning sports contacts with any country practising *apartheid* and recognizing that participation in *apartheid* in sports condones and strengthens *apartheid* and thereby becomes the legitimate concern of all Governments

....
Proclaims this International Declaration against *Apartheid* in Sports:

....
Article 2

States shall take all appropriate action to bring about the total cessation of sporting contacts with any country practising *apartheid* and shall refrain from official sponsorship, assistance or encouragement of such contacts.

....
Article 4

1. States shall publicly declare and express total opposition to *apartheid* in sports as well as full and active support for the total boycott of all teams and sportsmen from the racist *apartheid* sports bodies.

....
Article 5

States shall take appropriate actions against their sporting teams and organizations whose members collectively or individually participate in sports activities in any country practising *apartheid* or with teams from a country practising *apartheid*.

....
Article 13

International, regional and national sports bodies shall uphold the Olympic principle and cease all sports contact with the racist *apartheid* sports bodies.

....
Article 17

The provisions of this Declaration concerning the boycott of South African sports teams shall not apply to non-racial sports bodies endorsed by the Special Committee Against Apartheid, the Organization of African Unity and the South African liberation movements recognized by it and their members.

Article 18

All international, regional and national sports bodies and Olympic committees shall endorse the principles of this Declaration and support and uphold all provisions contained herein.

tre in preparing relevant data on South African sports.¹⁶⁶ The Centre publishes a periodic report documenting athletes who participate in South Africa in any sport.

In its report for 1988, the Centre noted an increase in the number of nations and sports organizations that followed the prohibitions against participation in South Africa.¹⁶⁷ Since the first register in 1981, only 224 athletes have pledged not to participate in South African sporting activities.¹⁶⁸ In contrast, 3392 athletes from fifty-six different countries disregarded the United Nations Resolution and competed in South Africa in 1988.¹⁶⁹ These numbers demonstrate that the Resolution has only a minimal impact.

Similarly, although passing the International Declaration Against Apartheid in Sports was an important first step, until more countries ratify the Declaration, the United Nations' actions represent only exhortations. International efforts against apartheid, such as secondary boycotts, must encompass diplomatic pressure and firm resolve.¹⁷⁰ In addition, countries are reluctant to participate in secondary boycotts,¹⁷¹ the legality of which is questionable.¹⁷²

As debate continues, however, firm world commitment to the United Nations ideal remains lacking.

Id.

166. UNITED NATIONS CENTRE AGAINST APARTHEID, REGISTER OF SPORTS CONTACTS WITH SOUTH AFRICA 1 JAN. 1988-31 DEC. 1988, at 2-3 (1989). Countries such as Canada and Spain have passed laws preventing South Africans from competing in their countries. Belgium refused to grant visas to South African golfers. The Swedish Sports Confederation declared that it would not allow anyone on the Centre's list to be invited by its golf and tennis federations to compete in Sweden. The World Boxing Council tightened its regulations by barring any boxer or manager connected with promotions involving South Africa. *Id.*

167. *See id.* at 5.

168. *Id.*

169. *See id.* at 47-102.

170. A secondary boycott is one that requires countries to refrain from associating with a target country. Countries are reluctant to take part in such boycotts because the use of economic coercion to further a state's political motives is suspect. *See Nafziger & Strenk, supra* note 1, at 285. The United Nations stated its disapproval of these types of boycotts in its 1970 Declaration on Friendly Relations which confirms "the duty of the states to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state." G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1970); *see also* Derek W. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245, 249 (1976).

171. To be illegal, these boycotts must be coercive under article 2, paragraph 4 of the United Nations Charter. *See Nafziger & Strenk, supra* note 1, at 286; *see also* Bowett, *supra* note 170, at 249.

172. IAAF CONST. rule 2.

C. *The International Amateur Athletic Federation and The Athletics Congress' Actions Toward South Africa*

The IAAF, the international governing body of track and field,¹⁷³ expelled South Africa from its organization in 1976 because of apartheid.¹⁷⁴ Following the actions by the IOC in 1991, the IAAF re-evaluated its position on South Africa.¹⁷⁵ In May 1991, a five-member delegation traveled to South Africa to assess the country's sports dilemma.¹⁷⁶ The IAAF sought (1) the abolishment of the apartheid laws by the end of June 1991; (2) the racial integration of sports facilities, training, and competitions; and (3) the unification of athletic groups.¹⁷⁷

Following this evaluation, the IAAF granted South Africa provisional membership in June 1991. Provisional membership allows South Africa to compete only against other African nations.¹⁷⁸ Additionally, the IAAF invited South Africa to its World Championships in Tokyo in August 1991.¹⁷⁹ As previously noted, however, South Africa rejected this invitation because of an internal disagreement over whether the abolishment of legal apartheid was enough of a condition to re-enter international athletics.¹⁸⁰ In the words of IAAF President Primo Nebiolo, "[The South Africans] must be brave if they want to break the isolation."¹⁸¹ Thus, although the athletes desired to compete, South Africa stood firm in its isolation.¹⁸²

In August 1991, the Council of the IAAF met and recommended that the full 184-nation congress extend South Africa's provisional membership for an additional two years, rather than upgrade its status to full membership.¹⁸³ Some believe that an element of retaliation over South Africa's rejection of the invitation to the 1991 World Track and Field Championships may have influenced the Council's

173. Cart, *supra* note 37, at C1.

174. Jack Carey, *Time For Change*, USA TODAY, May 9, 1991, at C1; see also *supra* notes 81-102.

175. Carey, *supra* note 174, at C1.

176. *Id.*

177. Neil Wilson, *Athletics: Threat to South Africa's Olympic Return*, THE INDEPENDENT, Aug. 19, 1991, at 26.

178. John Salvado, *Track Chief Puts Onus on South Africa*, UPI, July 24, 1991, available in LEXIS, Nexis Library, UPI File.

179. *South Africa Turns Down Tokyo Invitation*, *supra* note 6; see also *supra* notes 125-30.

180. Salvado, *supra* note 178.

181. Almond, *supra* note 125, at C1.

182. Wilson, *supra* note 177, at 26.

183. *Id.*

decision.¹⁸⁴ Most agree, however, that the decision resulted from the failure of South Africa to comply with the primary condition of establishing unity among the country's diverse governing bodies.¹⁸⁵ The disintegration of the unity talks in December 1991 demonstrated the difficulty of the task of unifying these organizations.¹⁸⁶ IAAF President Nebiolo refused to promise the South Africans a place in the 1992 Summer Olympics, thus leaving the question unanswered.¹⁸⁷ Full membership can only be granted by the IAAF's full congress, which does not meet again until 1993.¹⁸⁸ There was, however, the possibility that the IAAF Council could award full membership before the 1992 Barcelona Olympics.¹⁸⁹

South Africa still maintains only provisional membership in the IAAF. Thus, the means through which the IAAF and its member organizations have boycotted the country remain intact. For example, the IAAF and TAC, the IAAF's national representative in the United States, presently employ a combination of rules to bar an athlete from participating in South Africa.¹⁹⁰ First, the participation of an athlete from a country whose federation or organization has been suspended is prohibited.¹⁹¹ Second, any athlete who has participated in any athletic competition in which any of the competitors were, to

184. *Id.*

185. Neil Wilson, *World Athletics Championships: SA to Meet Best of Africa*, THE INDEPENDENT, Aug. 29, 1991, at 32.

186. *Seven More Suspended by TAC for South Africa Trip*, THE ATHLETICS CONG. NEWS, Dec. 15, 1988, at 2.

187. Wilson, *supra* note 185, at 32.

188. *Id.* In February 1992, IAAF readmittance of South Africa seemed almost assured when the IOC granted its president the right to choose two at-large members to the IOC. President Samaranch was expected to name IAAF head Nebiolo to the IOC post in exchange for the concession of the IAAF readmitting South Africa in time for the 1992 Barcelona Olympics. Nebiolo had been almost single-handedly responsible for the IAAF's failure to recognize South Africa. Randy Harvey, *IOC Might Limit Summer Entries*, L.A. TIMES, Feb. 8, 1992, at C9. In March 1992, Samaranch named Nebiolo to the IOC post and shortly thereafter announced that the vast majority of IAAF Council members favored South Africa's return. This softened stance resulted, in part, from Nebiolo's appointment. *Nebiolo Named to IOC Post*, L.A. TIMES, Mar. 8, 1992, at C7. However, IAAF did not vote on South Africa's return and delayed any possible action until its next meeting in April 1992. This move allows Nebiolo to delay a decision until after he leads a delegation to South Africa, a visit that will follow the March 15, 1992 South African referendum on President F.W. de Klerk's apartheid reforms. It appears that because Samaranch has already guaranteed South African participation at the Barcelona Olympics, and appointed Nebiolo as requested, South African participation is only a matter of time. Julie Cart, *South Africans Are Kept Waiting Again*, L.A. TIMES, Mar. 9, 1992, at C14.

189. *Sports Politics: Push for SA Unity*, THE INDEPENDENT, Dec. 20, 1991, at 31.

190. IAAF CONST. rule 12.

191. *Id.* rule 53.

his or her knowledge, ineligible to compete under IAAF rules is ineligible.¹⁹² Also ineligible is any athlete who participates in a nonsanctioned or unrecognized meeting of the country in which it is held.¹⁹³ Specifically, the IAAF's Rule 53 addresses situations involving the use of performance-enhancing drugs and participation by professional athletes, rather than cases of athletes from boycotted countries.¹⁹⁴ These rules were used mainly to prevent tainting amateur athletics with drug use or professional participation.¹⁹⁵

With the 1988 Zola Budd case, however, the IAAF expanded the use of these rules.¹⁹⁶ Zola Budd was an athlete born in South Africa who acquired British citizenship in order to compete at the international level.¹⁹⁷ Throughout her career, Budd faced harsh criticism despite her outstanding athletic performances.¹⁹⁸ For example, although Budd maintained valid British citizenship and residency, the international community demanded her banishment from international athletic competition because of her ties to South Africa.¹⁹⁹

Perhaps as a result of this incident, in 1988, the IAAF changed its interpretation of its rules.²⁰⁰ First, the IAAF altered the definition of "participation" to encompass Budd's appearance as a spectator at a South African cross-country event where she wore athletic clothing, a nondescript sweatsuit, and cheered for the runners.²⁰¹ The IAAF deemed Budd's appearance in a sweatsuit "participation" that defied the spirit of the rule.²⁰²

Second, Rule 53 lists certain situations in which an athlete may be declared ineligible.²⁰³ Athletes found using drugs, receiving compensation or endorsement for athletic performance, or knowingly participating with banned athletes may face sanctions.²⁰⁴ Under the new

192. *Id.*

193. *Id.*

194. *Id.*

195. Cart, *supra* note 37, at C1.

196. *Run—Budd Returns*, ASSOCIATED PRESS, Nov. 8, 1989, available in LEXIS, Nexis Library, AP File.

197. *Id.*

198. *Id.*

199. Cart, *supra* note 37, at C1.

200. *Id.*

201. *Id.* In another seemingly absurd development, the IAAF banned American Dick Tomlinson simply for organizing an athletic tour of 13 American athletes in South Africa. *Id.*

202. IAAF CONST. rule 53.

203. *Id.*

204. Telephone Interview with Julie Cart, Sportswriter, Los Angeles Times (Sept. 10, 1990) [hereinafter Cart Interview].

interpretation, however, these specifically enumerated situations are no longer exclusive. Now, if one South African athlete happened to run in the New York marathon, the 20,000 other competitors could technically be banned from international competition.²⁰⁵

Third, these rules, as now interpreted, are more far-reaching than originally intended. The IAAF expanded the existing definitions of the rules rather than creating new ones specifically to deal with the South African problem.²⁰⁶ By doing this, the IAAF generated considerable confusion over what constituted permissible conduct.

IV. THE SOUTH AFRICA 13 AND THE INTERNATIONAL SPORTS FEDERATIONS

A. *The South Africa 13*

Rule 12 of the IAAF Constitution prohibits any athlete from participating in a non-sanctioned event.²⁰⁷ Because an expelled country cannot sanction events, expulsion is tantamount to a boycott against participation in all South African athletic competitions.²⁰⁸ From 1976 until 1988, no United States athlete challenged this rule.²⁰⁹ Shortly after the 1988 Seoul Summer Olympics, however, a group of thirteen United States athletes, the "South Africa 13," participated in the first South African international track and field competition in twelve years.²¹⁰ Promoters guaranteed the athletes sizable sums of money to participate,²¹¹ which would be placed into a "trust fund" for the athletes. The athletic tour included some of the United States' premiere track and field athletes.

205. Cart, *supra* note 37, at C1.

206. IAAF CONST. rule 12.

207. *See id.*

208. Cart, *supra* note 37, at C1.

209. *NCAA Charges Kentucky Basketball With 17 More Violations*, L.A. TIMES, Oct. 16, 1988, at C16.

210. Jack Reed, *U.S. Athletes Promised Money To Break Boycott*, UPI, Oct. 15, 1988, available in LEXIS, Nexis Library, UPI File.

211. IAAF CONST. rule 17. Under IAAF rules, though technically considered "amateurs," track and field athletes are allowed to receive appearance fees, prizes, and awards. However, the athletes must place this money into a trust fund administered by a member federation. The athlete is able to draw upon this money to pay for various stipulated expenses, such as training and travel. *Id.* rules 14-17. These rules are based upon the principle that: [A]n athlete's health must not suffer, nor must he or she be placed at a social or material disadvantage as a result of his or her preparation for or participation in the sport of athletics. An athlete's national Federation shall control such material and financial assistance as may be reasonable and necessary to assure this.

Id.

Although TAC²¹² had not previously banned any athlete for participating in South Africa,²¹³ prior to the event Frank Greenberg of TAC indicated that the athletes would be reprimanded.²¹⁴ Nevertheless, the athletes remained undeterred by thoughts of possible suspension.²¹⁵ Many assumed TAC's punishment would be relatively lenient, as in substance abuse cases.²¹⁶ However, the TAC panel utilized the "contamination rule"²¹⁷ to suspend United States athletes for the first time,²¹⁸ and handed down suspensions for all thirteen athletes in four separate proceedings over a three-month period.²¹⁹ The athletes unsuccessfully appealed their decisions within TAC.²²⁰ Further, although the athletes had declared that they would challenge any suspension in court,²²¹ only one suit actually materialized.²²²

Even with the recent readmission of South Africa into the Olympic movement, the future of these thirteen athletes remains unclear. As of November 1991, only one athlete's suspension had been lifted entirely.²²³ In November 1991, TAC reduced Ruth Wysocki's four-year suspension, giving her the opportunity to compete as of January 1, 1992.²²⁴ The TAC gave no explanation for its actions.²²⁵

212. TAC is the United States' governing body for track and field sports. *NCAA Charges Kentucky Basketball With 17 More Violations*, *supra* note 209, at C16.

213. By participating, the athletes risked life suspension. *Id.*

214. *Id.*

215. Various suspensions are established for the specific drug involved and the number of times the athlete has tested positive. An example is the case of Mike Stulce, who, after testing positive for high testosterone levels in April 1990, was suspended from competition for two years. THE ATHLETICS CONG. NEWS, June 22, 1990.

216. *NCAA Charges Kentucky Basketball With 17 More Violations*, *supra* note 209, at C16.

217. *Cady v. The Athletics Cong.*, No. C 89-1737 (N.D. Cal. May 25, 1989).

218. Cart Interview, *supra* note 204; *NCAA Charges Kentucky Basketball With 17 More Violations*, *supra* note 209. The "contamination rule" previously stated that if an athlete knowingly participated with professionals, the athlete has essentially become contaminated. Thus, the athlete is subject to discipline by the IAAF or TAC. TAC expanded this rule to cover athletes participating in South Africa. *See id.*

219. *See NCAA Charges Kentucky Basketball With 17 More Violations*, *supra* note 209.

220. Randy Harvey, *TAC Delivers 7 More Suspensions*, L.A. TIMES, Dec. 16, 1988, at C1 [hereinafter Harvey, *TAC*]. The suspensions varied in length from two to twelve years. Randy Harvey, *World Sports Scene: Mardona Making Most of His News Off Playing Field*, L.A. TIMES, Nov. 2, 1989, at C3. TAC Review panel Chairman Richard Hoolander asserted that the variance in length of the penalties reflected the panel's determination that the levels of culpability differed among the athletes. *Id.*

221. *TAC Board Approves Random Drug Testing*, L.A. TIMES, Mar. 13, 1989, at C16.

222. Jon Saraceno, *Holyfield: No Squawk at Tyson, King Antics*, USA TODAY, Nov. 21, 1991, at 11C.

223. *Id.*

224. *Id.*

225. *Id.*

Of the remaining twelve athletes, only two completed their suspensions in time for the 1992 Barcelona Olympics.²²⁶ Because of the confusion resulting from South Africa's new status, the other ten athletes are unsure of their futures. For former United States citizen Tom Petranoff, now a South African citizen, the future is unclear because the IAAF ban may still apply to him regardless of South Africa's participation.²²⁷

Although seemingly short in duration, the suspensions amounted to a lifetime ban, as world-class competitors rarely compete for more than five or six years. One exception is Tom Petranoff, the former world record holder in the javelin event.²²⁸ Faced with losing his livelihood, Petranoff moved his family to South Africa, where he could compete without the fear of suspension.²²⁹ Although unable to compete against the world's best,²³⁰ he could at least participate in South Africa, and thereby support his family.²³¹

Although they provide for appeal through internal procedures, TAC rules do not allow athletes to have a hearing before an impartial judge or arbitration board.²³² TAC performs the legislative, executive, and judicial functions itself, not only making the rules, but enforcing them as well.²³³ An athlete has no remedy available in the

226. John Powers, *Fear in the Hills; Avalanche Shows the Threat Is Real*, BOSTON GLOBE, Dec. 29, 1991, at 50. The two athletes who were free to compete in the 1992 Olympics were Anthony Curran and Gregg Tafralis. *Id.* Tom Petranoff, John Powell, James Robinson, Dave Laut, Carol Cady, Patrick Drake, Brian Glosten, Pam Page, James Andrews, Tom Hinthaus, Tyrus Jefferson, Milan Stewart, and Ray Wicksell remained banned because of their participation in South African competitions. *Id.*

227. Phil Hersh, *Petranoff: Man Without 2 Countries*, CHI. TRIB., May 8, 1991, at C1.

228. Cart, *supra* note 7, at C1, C4.

229. *Id.* at C4.

230. *Id.*

231. *Id.*

232. *Suspension and Expulsion*, TAC By-laws, art. XIX. TAC or its Board can indefinitely suspend any member, delegate, or athlete for a violation of any of the TAC or IAAF rules, regulations, or by-laws. The expellee is entitled to fair notice and an opportunity to be heard. The expellee is also eligible to apply for reinstatement with the Secretary of TAC, who forwards the appeal to TAC's President for appointment of a review committee. The review committee then recommends reinstatement or continued punishment. *Id.* Upon being disciplined under article XIX, an athlete is notified of the charges and possible penalties. The athlete is entitled to a hearing before the Association, not less than thirty days, nor more than sixty days, after notice is mailed. The decision of the Association is appealable to the National Athletics Board of Appeal, a three-member panel appointed by TAC's President. Once that body rules on the appeal, the athlete may appeal to the full Board of the Congress, the final level of review. *Disciplinary Proceedings and Appeals*, TAC Operating Regulations, Reg. 13; see also *infra* part IV.B.2.

233. See IAAF CONST. rule 3.

United States legal system because (1) courts find that athletes in this situation possess no due process claim;²³⁴ (2) TAC and other similar bodies, although chartered by the federal government, are not considered "governmental actors";²³⁵ and (3) courts do not consider participation in an athletic competition a "liberty" or "property interest."²³⁶ Other claims, such as one under the Amateur Sports Act of 1978,²³⁷ are no longer options because courts have held the Act does not afford athletes a private right of action.²³⁸

Accordingly, two South Africa 13 members attempted to use the American legal system but were unsuccessful at the federal district court level.²³⁹ Carol Cady and John Powell sought a preliminary injunction against TAC that would allow them to participate in a national competition in Houston, Texas.²⁴⁰ In *Cady v. The Athletics Congress*,²⁴¹ the district court found that the plaintiffs failed to prove the prerequisites for such a preliminary injunction: a strong probability of success on the merits, and the likelihood of irreparable injury in the absence of preliminary relief.²⁴² Therefore, the athletes were denied relief. The court further held that because TAC is not a state actor, the athletes could not assert a claim under the Due Process Clause.²⁴³ The court cited several reasons for the lack of state action. First, TAC did not act under color of federal law because the government did not coerce the athletes' suspensions.²⁴⁴ Second, a close nexus did not exist between TAC and the government, a relationship necessary to demonstrate state action.²⁴⁵ Thus, the court held that Cady and Powell's constitutional claims could not stand.²⁴⁶

234. See *Cady v. The Athletics Cong.*, No. C 89-1737 (N.D. Cal. May 25, 1989); *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (D.D.C. 1980); *Fluitt v. University of Neb.*, 489 F. Supp. 1194 (D.C. Neb. 1980).

235. 36 U.S.C. §§ 371-396 (1988).

236. See *Cady v. The Athletics Cong.*, No. C 89-1737 (N.D. Cal. May 25, 1989); *DeFrantz*, 492 F. Supp. at 1181.

237. See *Colorado Seminary (Univ. of Denver) v. National Collegiate Athletic Ass'n*, 570 F.2d 320 (10th Cir. 1978); *Steffes v. California Interscholastic Fed'n*, 222 Cal. Rptr. 355 (1986).

238. See *Oldfield v. Athletic Cong.*, 779 F.2d 505 (9th Cir. 1985); *Michels v. United States Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984).

239. *Cady v. The Athletics Cong.*, No. C 89-1737 (N.D. Cal. May 25, 1989).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Cady v. The Athletics Cong.*, No. C 89-1737 (N.D. Cal. May 25, 1989).

245. *Id.*

246. *Id.*

The court also ruled that TAC acted properly within its own bylaws in giving Cady and Powell an opportunity to appeal the decision internally.²⁴⁷ As a result, Cady and Powell's available relief was limited to that provided by the Amateur Sports Act of 1978.²⁴⁸ That Act, however, limits relief to an appeal to the United States Olympic Committee.²⁴⁹

*B. An Overview of Sports Organizations: Their Rules,
History, and Processes*

1. International Organizations

It is easiest to imagine the international amateur athletic organizations as a large corporate umbrella controlled by the IOC. The IOC governs the Olympic Games and heads all aspects of amateur athletics that are part of the Olympic Games.²⁵⁰ In addition, the IOC is "a body corporate by international law having juridical status and perpetual succession."²⁵¹ The IOC can make and enforce rules, provided that they do not conflict with international legislation.²⁵² International federations such as the IAAF are subordinate to the IOC and govern their specific sport only.²⁵³ Such federations determine the rules that govern their sport within the bounds of the Olympic Charter.²⁵⁴ These international federations oversee the sport through affiliated national federations.²⁵⁵ In addition to federation control, the IOC controls and coordinates each country's Olympic activities through that country's Olympic committee.²⁵⁶

247. *Id.*

248. *Id.*

249. 36 U.S.C. § 395(a)(1) (1988). Section 395(a)(1) states, in part,

Any amateur sports organization or person which belongs to or is eligible to belong to a national governing body may seek to compel such national governing body to comply with the requirements of sections 391(b) and 392 of this title by filing a written complaint with the Corporation [USOC] . . . [but] may take such action only [after] having exhausted all available remedies within such national governing body for correcting deficiencies, unless it can be shown by clear and convincing evidence that those remedies would have resulted in unnecessary delay. The Corporation shall establish procedures for filing and disposition of complaints received under this subsection.

Id.

250. OLYMPIC CHARTER, *supra* note 12, rules 1, 2, 4, 19, 20, 23.

251. *Id.* rule 19.

252. Nafziger & Strenk, *supra* note 1, at 280.

253. OLYMPIC CHARTER, *supra* note 12, rules 4(3), 29, 30.

254. *Id.*

255. *Id.*

256. OLYMPIC CHARTER, *supra* note 12, rules 4, 31-33.

Theoretically, these national federations or Olympic committees are free from government influence and coercion. IOC members may not accept instruction or influence from any political, commercial, racial, or religious entity.²⁵⁷ Thus, the Olympic Charter attempts to prevent the Olympic Games' political or commercial exploitation.²⁵⁸ While the IOC ultimately controls the overriding policies, it delegates a great deal of power. Thus, depending on a particular country's laws, these national federations or Olympic committees can substantially affect an athlete's life and rights within that country.²⁵⁹

2. The United States' Organizations

The United States Olympic Committee ("USOC") is the United States' governing body for Olympic athletics.²⁶⁰ The USOC receives authority from two sources: the National Olympic Committee chosen by the IOC as the United States' representative,²⁶¹ and the Amateur Sports Act of 1978 ("Act").²⁶²

The United States Congress passed the Act to address two persistent problems that affect amateur athletics: (1) constant fighting among the various sanctioning federations for control over championships,²⁶³ and (2) the declining performance of United States amateur athletics at the international level.²⁶⁴ The Act created a vertical sports structure coordinating all amateur athletic organizations.²⁶⁵ Although the Act is federally chartered, the federal government does not control amateur athletics.²⁶⁶ The USOC has exclusive power to make all decisions regarding United States Olympic athletic participation.²⁶⁷

257. *Id.* bylaw to rule 12.

258. OLYMPIC REV., Mar. 1990, at 163.

259. The situation of the South Africa 13 is such a case. *TAC Board Approves Random Drug Testing*, L.A. TIMES, Mar. 13, 1989, at C16.

260. UNITED STATES OLYMPIC COMM. CONST. art. II (1991).

261. 36 U.S.C. §§ 371-396 (1988).

262. *Id.*

263. HOUSE COMM. ON THE JUDICIARY, H.R. REP. NO. 1627, 95TH CONG., 2D SESS. REPORT ON THE AMATEUR SPORTS ACT OF 1978 8-11 (1978) [hereinafter HOUSE REPORT]. For preliminary background on the history of these disputes, see also SENATE COMM. ON COMMERCE, S. REP. NO. 753, 89TH CONG., 1ST SESS., REPORT ON PROVIDING FOR THE SETTLEMENT OF DISPUTES INVOLVING AMATEUR ATHLETICS (1965).

264. HOUSE REPORT, *supra* note 263, at 8-9.

265. *Id.*

266. *Id.*

267. 36 U.S.C. § 374(3) (1988). The USOC is to "exercise exclusive jurisdiction . . . over all matters pertaining to the participation of the United States in the Olympic Games . . . , including the representation of the United States in such games." *Id.*

The Act assigns the USOC fourteen objectives,²⁶⁸ which are realized through a specific procedure.²⁶⁹ Among other powers, the USOC has the right to establish or approve one national governing body ("NGB") in each Olympic or Pan-American sport.²⁷⁰ In track and field, TAC is the sanctioned body.²⁷¹ Each NGB controls a specific sport and establishes its rules and regulations, which are usually in line with that sport's international governing body's rules and regulations.²⁷² The NGB determines which athletes may compete and in

268. James Nafziger, *The Amateur Sports Act of 1978*, in *LAW AND AMATEUR SPORTS* 117 (R. Waicukauski ed., 1982). The fourteen objectives are:

- (1) establish national goals for amateur athletic activities and encourage the attainment of those goals;
- (2) coordinate and develop amateur athletic activity in the United States directly relating to international amateur athletic competition, so as to foster productive working relationships among sports-related organizations;
- (3) exercise exclusive jurisdiction, either directly or through its constituent members of committees, over all matters pertaining to the participation of the United States in the Olympic Games and in the Pan-American Games . . . ;
- (4) obtain for the United States . . . the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan-American Games;
- (5) promote and support amateur athletic activities involving the United States and foreign nations;
- (6) promote and encourage physical fitness and public participation in amateur athletic activities;
- (7) assist organizations and persons concerned with sports in the development of amateur athletic programs for amateur athletes;
- (8) provide for the swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition;
- (9) foster the development of amateur athletic facilities for use by amateur athletes and assist in making existing amateur athletic facilities available for use by amateur athletes;
- (10) provide and coordinate technical information on physical training, equipment design, coaching, and performance analysis;
- (11) encourage and support research, development, and dissemination of information in the areas of sports medicine and sports safety;
- (12) encourage and provide assistance to amateur athletic activities for women;
- (13) encourage and provide assistance to amateur athletic programs and competition for handicapped individuals . . . ;
- (14) encourage and provide assistance to amateur athletes of racial and ethnic minorities for the purpose of eliciting the participation of such minorities in amateur athletic activities in which they are underrepresented.

36 U.S.C. § 374 (1988).

269. *See id.* §§ 371-396.

270. *Id.* § 391(a). "For any sport which is included on the program of the Olympic Games or the Pan-American Games, the Corporation [USOC] is authorized to recognize as a national governing body an amateur sports organization which files an application and is eligible for such recognition." *Id.*

271. TAC By-laws, Arts. III, IV.

272. 36 U.S.C. § 391(a) (1988).

which events.²⁷³

Since its enactment, athletes have complained of the Act's one glaring omission²⁷⁴—the absence of an "Athlete's Bill of Rights."²⁷⁵ Although the Act initially proposed such language, Congress subsequently determined "that an athlete's opportunity to compete . . . is best secured by creating an accountable and responsive NGB structure with a well-oiled process for conflict resolution."²⁷⁶ Pursuant to the Act, a federation must satisfy certain criteria regarding the Act's complaint process before becoming an Olympic sport's NGB.²⁷⁷ If an NGB fails to meet these requirements, an eligible athlete may file a complaint against the NGB with the USOC.²⁷⁸ Such a filing may only occur after the athlete exhausts all internal NGB remedies, unless there are special circumstances.²⁷⁹ The omission of an "Athlete's Bill of Rights" from the Act's final version exhibited Congress' conclusion that the NGB's internal procedure for hearing complaints and appeals was a satisfactory mechanism for protecting athletes.²⁸⁰

The national system, codified in the Amateur Sports Act of 1978, makes the USOC and TAC monopolistic organizations in their re-

273. Nafziger, *supra* note 268, at 116.

274. See *Michels v. United States Olympic Comm.*, 741 F.2d 155, 157-58 (7th Cir. 1984).

275. *Id.*

276. Nafziger, *supra* note 268, at 137.

277. 36 U.S.C. § 391(b) (1988).

No amateur sports organization is eligible to be recognized or is eligible to continue to be recognized as a national governing body unless it . . . (6) provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition . . . and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring such individual ineligible to participate . . . (11) provides procedures for the prompt and equitable resolution of grievances of its members

Id.

278. *Id.* § 395(a)(2).

279. Nafziger, *supra* note 268, at 138.

280. SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, S. REP. NO. 770, 95TH CONG., 2D SESS., REPORT ON THE AMATEUR SPORTS ACT OF 1978 5-6 (1978) [hereinafter SENATE REPORT]. TAC has a simplistic hearing process for rule infractions. First, the National Board of Athletics Review, a three-member panel designated by TAC, considers each athlete's case. TAC Operating Regulations, Regulation 13. For an example of one of the Board's votes on an athlete's future eligibility, see also THE ATHLETICS CONG. NEWS, Dec. 15, 1988, at 1. After consideration, the Board delivers TAC's official decision. TAC Operating Regulations, Regulation 13. Athletes can appeal the decision to TAC's full Board of Directors. *Id.* For an example of one of the Board of Directors' appeal votes on an athlete's future eligibility, see *TAC Board Approves Random Drug Testing*, *supra* note 221, at C16. This body consists of 71 people and is the final internal board of appeal. *Id.* Pursuant to the Act, an athlete may then appeal, if merited, to the USOC, which is the highest court within the amateur athletic structure. Nafziger, *supra* note 268, at 117-19.

spective fields. Because they devise their own rules, regulations, and procedures,²⁸¹ the USOC and TAC are autonomous, yet the government protects them from the existence of rival organizations.²⁸² However, because an athlete who breaks one of these organizations' rules is unable to have a hearing outside the monopoly, true due process does not exist.²⁸³ The athlete must appeal to a review board using laws created by the same board, a structure analogous to combining all three branches of the United States government. TAC legislates, enforces, and reviews all of its own rules. When political concerns infiltrate athletics as this Comment depicts, the result can be very dangerous and patently unfair.

V. A BANNED AMERICAN ATHLETE'S LEGAL REMEDIES

Although internal systems for appeal within sports federations exist, athletes may desire to utilize other legal channels in order to obtain an impartial and fair hearing of their claims.²⁸⁴ The monopolistic nature of international sports organizations and their United States representatives means that those who draft and enforce the rules also comprise the hearing and appeal boards. Consequently, the United States legal system should provide an impartial forum for an athlete, and thus avoid the unlawful deprivation of constitutional rights.

An athlete desiring to raise a constitutional claim may argue that a sports federation, acting as a governmental actor under either the Fifth or Fourteenth Amendment, violated his or her rights of equal protection and due process.²⁸⁵ Alternatively, the athlete could claim a cause of action under a federal statute, such as the aforementioned Amateur Sports Act of 1978.²⁸⁶ However, as noted above, the United States legal system essentially has eliminated these claims as options. Thus, the combination of few legal remedies, and the athletic federations' internal hearing and appeal process, leaves an athlete without a fair system to contest a lifetime ban from sports.

281. Nafziger, *supra* note 268, at 117-19.

282. 36 U.S.C. §§ 371-396 (1988).

283. See *Cady v. The Athletics Cong.*, No. C 89-1737 (N.D. Cal. May 25, 1989).

284. For example, an athlete may desire to bring a claim under the First, Fifth, or Fourteenth Amendments, under the Amateur Sports Act, or under the Sherman-Hartley Anti-Trust Act.

285. U.S. CONST. amends. V, XIV, § 1.

286. 36 U.S.C. §§ 371-396 (1988). For an example of such a futile attempt, see *Oldfield v. Athletic Cong.*, 779 F.2d 505 (9th Cir. 1985).

A. Constitutional Claims Under the Fifth and Fourteenth Amendments

A party must meet three requirements before a court will consider the question of whether due process has been received in a particular case.²⁸⁷ First, the aggrieved party must show that a federal or state government actor deprived him or her of a right.²⁸⁸ Second, the aggrieved party must be "a person" for constitutional purposes.²⁸⁹ Third, the state or governmental actor must have infringed upon the aggrieved party's interest in life, liberty, or property.²⁹⁰ Once a party establishes these elements, a court may analyze the sufficiency of the due process protections.²⁹¹ In the past, however, athletes have had difficulties proving the first and third requirements.²⁹² Thus, the due process afforded at sports federation hearings has rarely been examined by the United States legal system.

1. State Action Requirement

It is important to review the history of the "state action" requirement in order to understand the difficulty of finding state action in sports cases.²⁹³ The Fourteenth Amendment of the United States

287. LINDA SHARP, SPORT LAW 53 (NOLPE Monograph Series No. 40, 1990).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 53-54.

292. See *Behagen v. Amateur Basketball Ass'n*, 744 F.2d 731 (10th Cir. 1984) (holding that no due process right was violated as the Amateur Basketball Association was a private, rather than a governmental actor); *Burrows v. Ohio High School Athletic Ass'n*, 891 F.2d 122 (6th Cir. 1989) (holding that the action of a private association in amending bylaws did not constitute acting under color of state law); *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953 (6th Cir. 1986) (holding that the NCAA's adoption of rules regulating athletic eligibility of transfer students did not constitute "state action"); *McHale v. Cornell Univ.*, 620 F. Supp. 67 (D.N.Y. 1985) (holding that the plaintiff did not establish state action by either the NCAA or by the private university); *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (D.D.C. 1980) (decision of the USOC not to send a team to the 1980 Moscow Summer Olympics was not "state action" and, therefore, did not give rise to an actionable claim for infringements of constitutional rights); *Colorado Seminary (Univ. of Denver) v. National Collegiate Athletic Ass'n*, 570 F.2d 320 (10th Cir. 1978) (students' interest in participating in intercollegiate athletics did not rise to the level of the constitutionally protected property or liberty interest invoking due process guarantees); *Steffes v. California Interscholastic Fed'n*, 222 Cal. Rptr. 355 (1986) (holding that the right to participate in interscholastic athletics was not a fundamental right requiring a strict standard of review).

293. The United States Supreme Court noted that

[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. . . . A major consequence is to require the courts to respect the limits of their own power as di-

Constitution provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."²⁹⁴ Since the nineteenth century, "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States."²⁹⁵ Thus, by their terms, the due process and equal protection clauses of the Fourteenth Amendment provide no protection from private conduct.²⁹⁶ Courts must therefore pay special attention to the complaint to ensure that "state action" is present.²⁹⁷

Some basic guidelines have been established to find the necessary "state action" in acts by a "private" party. First, the mere fact that a business or organization is subject to state regulation does not by itself convert its action into that of the State for Fourteenth Amendment purposes.²⁹⁸ The complaining party must show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."²⁹⁹ This requirement ensures that constitutional standards are invoked only when the State is responsible for the specific conduct of which the plaintiff complains.³⁰⁰ For example, in order to be held responsible for a private decision, a State must have exercised coercive power or significantly encouraged the decision.³⁰¹ The second guideline is that mere approval of, or acquiescence to, the initiatives of a private party is not sufficient to hold a State responsible.³⁰² Finally, the private entity must have exercised powers that are "traditionally the exclusive prerogative of the State."³⁰³

Before 1982, courts generally held that public high school and collegiate athletic associations, although private, voluntary organiza-

rected against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 (1982).

294. U.S. CONST. amend. XIV, § 1 (emphasis added).

295. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (emphasis added).

296. *Id.*

297. Blum v. Yaretsky, 457 U.S. 991, 1003 (1982).

298. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974).

299. *Id.* at 351.

300. Blum, 457 U.S. at 1004.

301. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Jackson, 419 U.S. at 357; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

302. Flagg Bros., 436 U.S. at 164-65; Jackson, 419 U.S. at 357.

303. Jackson, 419 U.S. at 353; Flagg Bros., 436 U.S. at 157-61.

tions, were state actors for due process purposes.³⁰⁴ The courts used an "entanglement theory" to establish these associations as state actors,³⁰⁵ by holding that the activities of these associations were so intertwined in fact with those of the state, that the government supported or sanctioned the activities.³⁰⁶ Theoretically, such reasoning could be extended to the cases involving national amateur athletic federations.

After 1982, the state action doctrine went through several changes. In 1982, the Supreme Court decided three non-sports related cases that limited the definition of state action.³⁰⁷ The court in *Arlosoroff v. National Collegiate Athletic Ass'n*³⁰⁸ demonstrated the impact of these decisions by holding that the National Collegiate Athletic Association ("NCAA") was not a state actor because such indirect involvement with the state was insufficient.³⁰⁹ By 1986, the test, according to *Graham v. National Collegiate Athletic Ass'n*,³¹⁰ had become (1) whether the association was serving a function which was exclusively the state's prerogative; or (2) whether the state caused, controlled, or directed the association's action.³¹¹

Then, in 1988, the Supreme Court decided *National Collegiate Athletic Ass'n v. Tarkanian*,³¹² which, according to some commenta-

304. *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.*, 552 S.W.2d 685 (Ky. Ct. App. 1977); *Parish v. National Collegiate Athletic Ass'n*, 361 F. Supp. 1220 (W.D. La. 1973), *aff'd* 506 F.2d 1028 (5th Cir. 1975); *Howard v. National Collegiate Athletic Ass'n*, 510 F.2d 213 (D.C. Cir. 1975).

305. SHARP, *supra* note 287, at 54. Under this theory, the courts found that the association's activities were so intertwined with the State that the association's activities were, in effect, supported or sanctioned by the government. See *Kentucky High*, 552 S.W.2d at 685; *Parish*, 361 F. Supp. at 1220; *Howard*, 510 F.2d at 213.

306. See *Kentucky High*, 552 S.W.2d at 685; *Parish*, 361 F. Supp. at 1220; *Howard*, 510 F.2d at 213.

307. *E.g. Blum v. Yaretsky* 457 U.S. 991 (1982) (in a class action suit against the New York Department of Social Services, the Department's decision to transfer Medicaid patients to lower levels of care did not establish "state action"); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) (holding that attachment of property by judicial action does not constitute "state action" and denial of due process; to prove state action and denial of process one must be able to show action that is "fairly attributable" to a state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (dismissal of vocational counselors and teachers at a high school for maladjusted students was held not to be "state action" since the Court felt that the school, even though receiving public funds, was more like a government contractor).

308. 746 F.2d 1019 (4th Cir. 1984).

309. *Id.* at 1022.

310. 804 F.2d 953 (6th Cir. 1986).

311. *Id.* at 958.

312. 488 U.S. 179 (1988).

tors, conclusively resolved this state action question.³¹³ In *Tarkanian*, the Court held that the NCAA was not a state actor when it suspended Tarkanian from coaching, because the NCAA did not act jointly with the state.³¹⁴ One commentator noted that the *Tarkanian* decision should not be considered definitive on whether the NCAA, or organizations like it, are deemed state actors for the purposes of the Due Process Clause.³¹⁵ Both the decision's vague language and the split among the Court's members leave many questions unanswered.³¹⁶ For example, the outcome may vary if the plaintiff were a student athlete, rather than an institutional employee.³¹⁷ Thus, although the *Tarkanian* Court attempted to end all controversy as to whether sporting associations are state actors, case law may continue to set precedent in this area. For example, earlier cases questioned whether similar organizations could be state actors when the plaintiff was a student.³¹⁸ In *Behagen v. Intercollegiate Conference of Faculty Representatives*,³¹⁹ the district court held that an action taken outside the scope of a body's own procedural regulations violates due process of law.³²⁰ The defendant, the Big Ten Conference, a collegiate sports conference made up of both private and public institutions,³²¹ attempted to suspend the plaintiff from participating in the basketball program following his involvement in an altercation during a game.³²² However, a court invalidated the plaintiff's suspension, holding that the Big Ten failed to provide a hearing, the minimum standard of due

313. SHARP, *supra* note 287, at 55.

314. *Tarkanian*, 488 U.S. at 179. In *Tarkanian*, after a lengthy investigation of allegedly improper recruiting practices by the University of Nevada, Las Vegas ("UNLV"), the NCAA's Committee on Infractions found 38 violations, including 10 by Tarkanian, UNLV's basketball coach. The Committee imposed a number of sanctions upon UNLV, and requested UNLV to show cause why additional penalties should not be imposed if UNLV failed to suspend Tarkanian from its athletic program during a probation period. Facing demotion and a drastic cut in pay, Tarkanian brought suit in a Nevada state court, alleging that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983. Ultimately, Tarkanian obtained injunctive relief and an award of attorney's fees against both UNLV and the NCAA. The decision was affirmed by the Nevada Supreme Court. *Id.*

315. Arline F. Schubert & Cheryl L. Schubert-Madsen, *The NCAA as a State Actor: Decisions, Causes & Effects*, 1 LEGAL ISSUES IN SPORT 104 (1989).

316. *Id.*

317. *Id.*

318. See *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989); *Fluitt v. University of Nebraska*, 489 F. Supp. 1194 (D. Neb. 1980).

319. 346 F. Supp. 602 (D. Minn. 1972).

320. *Id.* at 606.

321. See generally KENNETH WILSON & JERRY BRONDFIELD, *THE BIG TEN* (1967).

322. *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602, 603 (D. Minn. 1972).

process.³²³ Yet, the importance of this ruling resides in a point the court failed to address. By failing to analyze whether the Big Ten was a state actor, the court simply assumed its status as such, because state action is a prerequisite to determining whether there has been sufficient due process.³²⁴

Similarly, the court in *Fluitt v. University of Nebraska*³²⁵ held that the plaintiff had no due process claim absent evidence of a proprietary interest in collegiate athletics.³²⁶ *Fluitt* involved an athlete who was declared ineligible to participate in collegiate athletics by the Big Eight Conference.³²⁷ Again, the court omitted any discussion regarding the defendant's status as a state actor, thus presuming its status as such. Although the analysis of state action is less than clear, the willingness to hear due process claims offers hope to athletes in similar positions.

Unfortunately, however, for athletes in positions similar to those of the South Africa 13, the majority of cases are not in their favor. Many cases, both before and after the *Tarkanian* decision, have determined that most athletic associations, including the NCAA,³²⁸ Amateur Basketball Association,³²⁹ USOC,³³⁰ and Ohio High School Athletic Association,³³¹ are not "state or governmental" actors.³³² In addition, the Supreme Court's decision in *Tarkanian* may have resolved this question.³³³

For example, in *Cady v. The Athletics Congress*,³³⁴ the court held that, while acting pursuant to the Amateur Sports Act, TAC performs no traditional governmental functions.³³⁵ *Cady* involved TAC's barring of two athletes for participating in South African athletic competitions. The plaintiffs attempted to obtain an injunction to

323. *Id.* at 607.

324. SHARP, *supra* note 287, at 53.

325. 489 F. Supp. 1194 (D. Neb. 1980).

326. *Id.* at 1194.

327. *Id.* at 1197-98.

328. See generally *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953 (6th Cir. 1986); *McHale v. Cornell Univ.*, 620 F. Supp. 67, 70 (D.N.Y. 1985).

329. See *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524, 530 (10th Cir. 1989).

330. See *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1193 (D.D.C. 1980).

331. See *Burrows v. Ohio High School Athletic Ass'n*, 891 F.2d 122 (6th Cir. 1989).

332. See *supra* notes 329-332.

333. SHARP, *supra* note 287, at 55.

334. No. C 89-1737 (N.D. Cal. May 25, 1989).

335. See *id.*

allow them to participate in a national track and field championship.³³⁶ However, the court rejected this attempt, stating that TAC did not act under color of federal law because there was no coercive government power over TAC's actions.³³⁷ Additionally, the court held that the plaintiffs failed to show a sufficiently close nexus between the acts of the private entity, TAC, and the government, to justify characterizing TAC's ruling as state action.³³⁸

These decisions largely eliminated an athlete's hope of using the United States legal system to obtain an impartial hearing to overturn a suspension. Although the USOC and its member NGBs are federally chartered to regulate an entire area of activity,³³⁹ the United States legal system does not consider these organizations to be state actors.

In their defense, legislators argue that athletics has never been controlled by the government, and, thus, athletics are outside their realm.³⁴⁰ However, once the government regulates those in charge of United States athletics, a system of indirect control emerges, as it does in other countries.³⁴¹ While this configuration should fulfill the definition of "state or governmental" actors and confer on athletes the right to bring due process claims, such circumstances do not currently exist.

2. Infringed Interest Requirement

Assuming a plaintiff has demonstrated state action, in order to prevail in a due process claim, it must still be demonstrated that the state actor infringed upon a life, liberty, or property interest.³⁴² These types of interests enjoy protection because the Fourteenth Amendment forbids the states from depriving one of individual rights, while the Fifth Amendment forbids the federal government from infringing

336. *Id.* at 2.

337. *Id.* at 3.

338. *Id.* at 4.

339. HOUSE REPORT, *supra* note 263, at 8-11.

340. *Id.* at 9.

341. The best example of state-controlled athletics existed in the former Soviet Bloc. The Soviets and their satellite countries supported an elaborate system of schools, training, and competitions aimed at developing the best athletes possible. The program's main purpose, besides winning championships, was to serve as a conduit for spreading the communist ideology. Other non-Soviet Bloc countries utilizing such a system are Cuba and the People's Republic of China. For a general discussion of the Soviet system, see SIMON FREEMAN & ROGER BOYES, *SPORTS BEHIND THE IRON CURTAIN* (1980).

342. *Paul v. Davis*, 424 U.S. 693, 711-12 (1975).

on rights guaranteed by the Bill of Rights without due process of law.³⁴³ Issues in sports raise few questions regarding life interests.³⁴⁴ However, issues concerning liberty and property interests do arise.³⁴⁵

a. Liberty Interest

Generally, courts decline to recognize sports participation as a part of an individual's liberty interest.³⁴⁶ Nonetheless, the Supreme Court has taken a broad view of the liberty interest, stating,

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.³⁴⁷

Successful arguments exist for finding a liberty interest if an athlete suffers a "stigma" due to the action in question.³⁴⁸ In *Paul v. Davis*,³⁴⁹ the Supreme Court held that defamatory conduct alone fails to rise to the level of a constitutionally protected stigma.³⁵⁰ In *Paul*, a police chief distributed flyers containing suspected shoplifters' names and photographs to local merchants.³⁵¹ Subsequently, Davis was arrested for shoplifting, but not convicted.³⁵² Davis then sued the city for damage to his reputation, as his name was included on the flyer.³⁵³ The Court held that damage to one's "reputation," by itself, is insufficient to constitute a liberty interest.³⁵⁴ The Court believed that an additional, more tangible, interest must suffer, such as Davis' ability to gain employment.³⁵⁵ Therefore, in order to invoke constitutional

343. See U.S. CONST. amends. V and XIV, § 1.

344. See, e.g., *State Bank of St. Charles v. Camic*, 712 F.2d 1140 (7th Cir. 1983) (prisoner who committed suicide while still in custody had a recognizable life interest). But see *Brooks v. School Bd. of Richmond*, 569 F. Supp. 1534 (E.D. Va. 1983) (holding that a teacher's piercing a student's arm with a straight pin did not represent a constitutional infringement upon a life or liberty interest).

345. SHARP, *supra* note 287, at 56-57.

346. *Id.*

347. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

348. SHARP, *supra* note 287, at 56.

349. 424 U.S. 693 (1975).

350. *Id.* at 694.

351. *Id.* at 694-95.

352. *Id.* at 695-96.

353. *Id.* at 695-97.

354. *Paul*, 424 U.S. at 701.

355. *Id.*

protection of a liberty interest, something besides reputation damage must be involved.

The Supreme Court referred to this extra requirement as the "stigma plus" test.³⁵⁶ In *Stanley v. Big Eight Conference*,³⁵⁷ a football coach was suspended after an NCAA investigation implicated him in violating various rules.³⁵⁸ The coach subsequently filed a due process claim. The court found that the NCAA's action had a stigmatizing effect upon the coach's ability to pursue his career. Therefore, the court held that the NCAA violated the coach's liberty interest.³⁵⁹ The court reasoned that because the coach's dismissal resulted from the violation of NCAA rules, the action satisfied the "stigma plus" requirement.³⁶⁰

In contrast, courts have found that mere participation in athletics, or the prevention from doing such, does not implicate a constitutionally protected liberty interest. For example, the Tenth Circuit in *Colorado Seminary (Univ. of Denver) v. National Collegiate Athletic Ass'n*,³⁶¹ held that a student athlete's interest in participating in inter-collegiate sports was not constitutionally protected.³⁶² In *Colorado Seminary*, the university and several student athletes attempted to prevent the NCAA from imposing sanctions against several university athletic teams.³⁶³ However, the court felt that participating in inter-collegiate athletics was not a constitutionally protected right.³⁶⁴ The court offered the caveat that when the denial of a college athletic scholarship is involved, a distinction may exist.³⁶⁵

Thus, it appears that mere participation is insufficient to invoke a due process claim. Similarly, mere dismissal was not enough to require due process in *Lagos v. Modesto City Schools District*.³⁶⁶ In *Lagos*, the court held that a baseball coach, whose contract was not renewed, was not denied due process because no stigma accompanied the dismissal.³⁶⁷

356. Board of Regents v. Roth, 408 U.S. 564 (1972).

357. 463 F. Supp. 920 (W.D. Mo. 1978).

358. *Id.* at 925-27.

359. *Id.* at 929.

360. *Id.*

361. 570 F.2d 320 (10th Cir. 1978).

362. *Id.* at 321.

363. *Id.*

364. *Id.*

365. *Id.*

366. 843 F.2d 347 (9th Cir. 1988).

367. *Id.* at 350.

Thus, the ultimate question for an athlete banned for participation in South Africa is whether any stigma results from TAC's action. In order to involve a liberty interest, one must argue that an athlete's ban from participation affects some other tangible right. Because the ban affects one's professional reputation, it will have serious consequences on the athlete's future livelihood in sports. The athlete's ability to participate then becomes a lost commodity. Further losses may ensue from the accompanying bad publicity, which can affect the athlete's chances at other opportunities, both in and out of the sports world. Athletes must further explore these arguments if a "stigma plus" argument is to be raised successfully.

b. Property Interest

The final interest that a state actor can invade, giving rise to a due process claim, is a property interest. However, as this Comment addresses only amateur athletes, it is difficult to argue that a property interest is involved. The Supreme Court broadly interprets property interests, stating that they "extend well beyond actual ownership of real estate, chattels, or money."³⁶⁸ The Court in *Board of Regents v. Roth* described property interests as follows:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . [P]roperty interest[s], of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.³⁶⁹

Athletes have had varying success in attempting to argue that the right to participate in athletics involves a property right.³⁷⁰ Courts have ruled that there is no property right in athletic participation, unless a scholarship is involved.³⁷¹ Most courts hold that a future scholarship or future professional contract is too speculative to be

368. *Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

369. *Id.* at 577.

370. SHARP, *supra* note 287, at 56-58.

371. *Id.* at 57; see also *Colorado Seminary (Univ. of Denver) v. National Collegiate Athletic Ass'n*, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978); *Gulf S. Conference v. Boyd*, 369 So. 2d 553 (Ala. 1979) (citing cases that determined a scholarship to be a property right).

deemed a right.³⁷² However, there are a few cases that have held to the contrary.³⁷³ For example, *Hall v. University of Minnesota*³⁷⁴ held that attending a university is a property right,³⁷⁵ and that the plaintiff's prospects for a career in professional basketball would be substantially diminished by his suspension.³⁷⁶ Although the court did not find this future contract to be a right in itself, it did emphasize the plaintiff's future aspirations and chances for success in professional basketball when weighing all the factors.³⁷⁷ The court believed the athlete's suspension would greatly diminish this opportunity.³⁷⁸ Similarly, in *Behagen v. Intercollegiate Conference of Faculty Representatives*,³⁷⁹ the court held that deprivation of a property interest may occur when an athlete's chances for future employment with a professional sports franchise are severely limited by the denial of an opportunity to display his or her talents at the collegiate level.³⁸⁰

Thus, to claim that a property right has been interfered with, one must have a right to participate, because the athlete must showcase his or her talents for a future financial benefit.³⁸¹ This argument seems inconsistent, however, because an "amateur" athlete by definition performs only for the sake of competition itself.³⁸² Some may attempt to make the superficial argument that amateur athletes are technically "professionals," because under existing bylaws, athletes can receive endorsements, appearance fees, and prizes, so long as the funds are placed into a trust.³⁸³

It is obvious, however, that this money means a great deal to the athletes. Income derived from competing at the amateur level goes to more than just training expenses. Tom Petranoff moved his entire family halfway around the world to compete in order to support his family through amateur athletics.³⁸⁴ The difficulty with finding a

372. SHARP, *supra* note 287, at 57-58.

373. See, e.g. *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972); *Hall v. University of Minn.*, 530 F. Supp. 104 (D. Minn. 1982).

374. 530 F. Supp. 104 (D. Minn. 1972).

375. *Id.* at 107 (citing *Abbario v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 112 (Minn. 1977)).

376. *Hall*, 530 F. Supp. at 108.

377. *Id.*

378. *Id.* at 106.

379. 346 F. Supp. 602 (D. Minn. 1972).

380. *Id.* at 604.

381. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

382. WEBSTER'S NEW WORLD DICTIONARY 43 (2d College ed. 1979).

383. IAAF CONST. rules 14-17.

384. *Cart*, *supra* note 7, at C1; see *supra* notes 228-31 and accompanying text.

property interest is the lack of a theory on which to base a claim that the athlete is "entitled" to this income. Thus, instead of attempting to find a property right, one may argue that by preventing these athletes from participating and earning their living, antitrust issues may arise.³⁸⁵ Athletes should be able to pursue their careers free from monopolistic intrusion.³⁸⁶ For now, however, the likelihood of an athlete showing a property right in participation is minimal.

3. Due Process Requirement

After establishing the preceding requirements, the claimant is entitled to due process.³⁸⁷ Yet, the amount of due process required will vary with the situation.³⁸⁸ In order to determine the presence of adequate due process, courts consider several factors.³⁸⁹ The Supreme Court has developed a three-pronged test,³⁹⁰ examining (1) the magnitude or importance of the interest involved; (2) the extent to which the requested procedure would reduce errors in decision making; and (3) the burden on the administrative body to provide appropriate procedural safeguards.³⁹¹ Courts use this triple-pronged test to determine to what extent the due process requirements—a hearing, notice of the hearing, and notice of the allegations of wrongdoing—are required.³⁹² Unfortunately, there are no concrete standards to apply in this area.³⁹³

As noted earlier, the problem is not that the procedures of these federations have been adjudged fair. Rather, the processes have not been judged at all, because many athletes are unable to satisfy the "state action" and "interest violated" requirements.

385. See C. Clifford Allen III, *Application of State Antitrust Laws to Athletic Leagues or Associations*, 85 A.L.R.3d 970 (1978). In general, the Sherman Act, 15 U.S.C. § 1 (1992), protects the right of individuals to be free to compete. *Id.* An argument could be made that by passing the regulations that ban athletes for participation, and by requiring federation approval to participate, the United States amateur sports complex under the Amateur Sports Act of 1978 creates a conspiracy that prevents athletes from earning their living. An athlete is essentially forced to contract with TAC to compete. United States and world sports federations are in effect contracting with each other to ban the athlete's future participation after competing in South Africa.

386. *Id.* at 970-71.

387. SHARP, *supra* note 287, at 58.

388. *Id.*

389. *Id.*

390. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

391. *Id.* at 335.

392. *Id.*

393. *Id.*

Until an athlete is able to bring a case before a competent court, the three-pronged test cannot be employed to determine if the athlete received a fair chance to redress his or her grievance. One commentator³⁹⁴ suggests that the benchmark for sports law in this area is *Goss v. Lopez*.³⁹⁵ In *Goss*, the Supreme Court held that a student suspended for ten days for violating school rules was entitled to a hearing.³⁹⁶ The hearing would consist first of informing the student of the alleged misconduct.³⁹⁷ Then, if the student denied the charge, due process would require the school to inform the student of the evidence upon which the charge is based, and to allow the student a chance to contest the allegations.³⁹⁸

Having a minimum of due process constitutes only a small part of the problem created by the current system. Nor is the larger problem confronting athletes in TAC's system the fact that they do not receive a hearing. First, IAAF rules have been changed in their application and definition.³⁹⁹ Due process requires notice of the existence of both the rule prohibiting particular conduct and the possible penalty.⁴⁰⁰ As shown, however, it is very unlikely in the case of the South Africa 13 that either of these requirements were met. Accordingly, TAC's system failed to provide due process.

Even more important, athletes face an uphill battle toward securing an impartial hearing. Providing an athlete with a hearing becomes illusory if that hearing is not heard by impartial judges. In the case of the South Africa 13, one of the three judges involved in the initial hearing on the athletes' cases apparently prejudged the situation.⁴⁰¹ Once these athletes competed in South Africa, and before any official TAC action ensued, Frank Greenberg, a TAC official, remarked, "[T]he athletes *will be suspended*."⁴⁰² Greenberg was one member of the three-member TAC panel that eventually handed down the suspensions in the months following the South African competition.⁴⁰³ Accordingly, it is naive to believe that Mr. Greenberg

394. William Buss, *Due Process in the Enforcement of Amateur Sports Rules*, in *LAW & AMATEUR SPORTS* 1, 23 (Richard Waicukauski ed., 1982).

395. 419 U.S. 565 (1975).

396. *Id.* at 586.

397. *Id.* at 582.

398. *Id.*

399. Cart, *supra* note 37, at C15.

400. Buss, *supra* note 394, at 28.

401. See *TAC Board Approves Random Drug Testing*, *supra* note 221, at C16.

402. *Id.* (emphasis added)

403. Harvey, *TAC*, *supra* note 220, at C15.

had not already decided the athlete's fate before conducting the "impartial" hearing. Therefore, even if an athlete possesses a protectable life, liberty, or property interest, and even if the hearing requirement is met, justice remains unrealized if an athlete cannot obtain an impartial hearing.⁴⁰⁴ The relevant inquiry is not whether we approve of the actions of these athletes, but whether politics should be allowed to circumvent their due process rights.

B. Statutory Claims

Athletes have also argued that under the Amateur Sports Act of 1978 they have a private cause of action to challenge disqualifications by their respective sports federations.⁴⁰⁵ Unfortunately, circuit courts are unwilling to recognize either an actual or implied right under this statute.⁴⁰⁶ Instead, the athlete must rely on the internal processes of those organizations under the Act.

Two cases illustrate how the circuit courts have eliminated a private cause of action under the Amateur Sports Act of 1978.⁴⁰⁷ First, in *Michels v. United States Olympic Committee*,⁴⁰⁸ the court suspended a weightlifter from international competition because of impermissible levels of testosterone.⁴⁰⁹ The court held that the athlete had no private cause of action under the Amateur Sports Act of 1978,⁴¹⁰ noting that the Act contained no express private cause of action.⁴¹¹ The court also examined whether an implied cause of action existed,⁴¹² utilizing the test established in *Cort v. Ash*.⁴¹³ The test includes four factors: (1) whether the plaintiff is a member of a class that the statute intends to benefit; (2) whether there is an indication of Congress' intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the statute's underlying purposes; and (4) whether the cause of action traditionally is relegated to

404. See *supra* part V.

405. See *Michels v. United States Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984); *Oldfield v. Athletic Con.*, 779 F.2d 505 (9th Cir. 1985).

406. *Oldfield*, 779 F.2d at 508.

407. *Id.* at 507. Any amateur athlete may bring an action under the Act, but may only go through the internal processes of the sport's NGB, and then to the USOC. The Act does not provide for causes of action brought outside the system. See 36 U.S.C. § 395 (1988).

408. 741 F.2d 155 (7th Cir. 1984).

409. *Id.* at 156.

410. *Id.* at 157.

411. *Id.*

412. *Id.* at 157-58.

413. 422 U.S. 66 (1975).

state law.⁴¹⁴

The court in *Michels* relied on more recent United States Supreme Court decisions that emphasized the second factor, congressional intent, as the determinative issue.⁴¹⁵ As in the more recent Ninth Circuit case, *Oldfield v. Athletic Congress*,⁴¹⁶ the *Michels* court found that Congress did not intend to create a private cause of action.⁴¹⁷ Although Congress originally proposed an "Amateur Athlete's Bill of Rights," strong resistance by high school and college communities led to a compromise in the original proposal.⁴¹⁸ The compromise required that certain substantive provisions be included in the USOC Constitution rather than in the bill itself.⁴¹⁹ Although sympathizing with the plaintiff, the court stated, "[T]he ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law."⁴²⁰

Similarly, in *Oldfield*, the court held that no implied cause of action existed under the Act. Oldfield challenged his disqualification by TAC and attempted to take this congressional intent argument one step further.⁴²¹ He believed that the court should infer a right from the Act.⁴²² Oldfield narrowed his argument, contending that because the private right of action disappeared in response to pressure from high school and collegiate groups, Congress only intended to eliminate a *student* athlete's cause of action.⁴²³ As a non-student athlete, Oldfield, as well as most of the other athletes discussed throughout this Comment, would have a cause of action.⁴²⁴

However, the *Oldfield* court did not find this argument persuasive. According to the court, the Act's provisions concern resolution of disputes and conflict in reference to amateur athletes in general.⁴²⁵ Moreover, the court believed that Oldfield relied too heavily on pre-

414. *Id.* at 78.

415. *Michels*, 741 F.2d at 157; see also *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378-79 (1982); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)).

416. 779 F.2d 505, 507 (9th Cir. 1985).

417. *Michels*, 741 F.2d at 157.

418. See S. 2036, 94th Cong., 1st Sess. § 304(a) (1977).

419. SENATE REPORT, *supra* note 280, at 5-6 (1978).

420. *Michels*, 741 F.2d at 158.

421. *Oldfield*, 779 F.2d at 505.

422. *Id.* at 507.

423. *Id.*

424. *Id.*

425. *Id.*

revision statements of the Act's sponsors because subsequent legislative action directly contradicted those statements.⁴²⁶ The court held that when Congress wishes to confer a right, it knows precisely how to do so.⁴²⁷ Accordingly, the court held that no implied right of action existed under the Act.⁴²⁸

It appears that the United States legal system has forestalled a statutory claim. Congress and the courts, following legislative history, have left it to the USOC and its NGBs to ensure that proper procedures are used to resolve athletes' grievances.⁴²⁹ Yet, as this Comment demonstrates, an athlete cannot obtain an impartial hearing within the NGB's apparatus. To place the responsibility on the USOC is unresponsive to these athletes' claims, because the government has erected the existing apparatus. Athletes have no real forum to settle their grievances fairly and impartially. If the Act is not considered federal legislation enforceable by the courts,⁴³⁰ new legislation, or a radical change in the United States amateur athletic system, as established in the Amateur Sports Act of 1978, must occur in order to provide athletes with adequate due process.

An "Athlete's Bill of Rights" would engender greater impartiality and fairness if it made two changes from the current system. First, the NGB's role in the suspension procedure could be eliminated. Under this alternative, a special appeals board under the present USOC infrastructure could be created to deal with the suspensions of all athletes from all United States NGBs. Alternatively, the USOC could adjudicate cases. However, the first proposal may be more realistic because the USOC may still not be a disinterested party.

Second, the United States Congress could classify the USOC and its member NGBs as "state actors," and develop a recognizable right to participate in athletics on the amateur level. The present appeals apparatus could remain, and, if warranted, the more egregious cases could be handled by the United States legal system under the Fourteenth Amendment.

VI. CONCLUSION

This Comment argues that politics has no place in athletics.

426. *Oldfield*, 779 F.2d at 507-08.

427. *Id.* at 508.

428. *Id.*

429. SENATE REPORT, *supra* note 280, at 5-6.

430. *Michels v. United States Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984).

Politics destroys the foundation of athletic competition. For this reason, the founders of the modern Olympic movement intentionally rejected political influence. Unfortunately, politics appears inextricably intertwined with athletics at the present time. Therefore, fairness must be introduced into the hearing system. In failing to create an "Athlete's Bill of Rights" when it passed the Amateur Sports Act of 1978,⁴³¹ Congress erroneously assumed that an athlete receives adequate protection under the present internal mechanisms of the USOC and its member organizations.⁴³² However, such a belief is far from reality.

Political restraints on athletics continue to grow each year, and, as a result, the athletes suffer. Officials are making decisions before hearings are even held, yet these hearings are still considered fair and impartial. Accordingly, the time has come for the United States Congress to create an "Athlete's Bill of Rights," so that an athlete's lifetime work is not unfairly swept away. An effective "Athlete's Bill of Rights" would provide the athletes with an awareness of current rules that apply to their individual situations, as well as an opportunity to have their conduct evaluated fairly and impartially.

This Comment does not attempt to address the morality of apartheid. Rather, this Comment addresses whether international sports organizations should penalize those who have no connection to an oppressive political regime. While legally repealed, the practical effect of apartheid for many non-white South Africans remains unchanged. Regardless of whether apartheid is eliminated, the dilemma of politics influencing athletics will remain. The penalties levied against athletes who compete in "politically incorrect" competitions are overly harsh. As a result, the sting of apartheid has reached beyond the borders of South Africa. Put succinctly, highly politicized sports organizations should not be able to ambush athletes who make informed decisions on how to conduct their competitive lives.

Owen S. Solomon*

431. SENATE REPORT, *supra* note 280, at 5-6.

432. *Id.*

* In loving memory of Ruth Cohen—inspiration, friend, strawberry connoisseur, cultural guru . . . grandmother.

